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NOS. 79-1404, 79-1408,
79-1414, 79-1415, 79-1489

IN THE SUPREME COURT OF THE
UNITED STATES

OCTODER TERM, 1980

In re Pennhurst Parents-
Staff Association,

Petitioner and Movant

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA OR, IN THE ALTERNATIVE, FOR MODIFICATION OF THIS COURT'S STAY ORDER OF JUNE 30, 1980

JOEL I. KLEIN
DAVID R. BOYD
H. BARTOW FARR, III
SUSAN L. CARNEY

Rogovin, Stern & Huge
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for the
Pennhurst Parents-Staff
Association

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QUESTIONS PRESENTED

1. Whether the interpretation and implementation by the United States District Court for the Eastern District of Pennsylvania of this Court's stay order of June 30, 1980 in Pennhurst State School and Hospital, et al v. Terri Lee Halderman, et al, Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489, renders the issuance of a writ of mandamus and prohibition necessary and appropriate to assure that this Court's order is honored.

2. Whether the circumstances presented herein warrant modification and expansion of this Court's stay order of June 30, 1980. */

*/ The petition for writ of prohibition and mandamus seeks a writ directed to the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, and the motion for stay is directed toward the orders of that court. In addition, all of the petitioners and respondents in the Pennhurst cases may have an interest in this matter, and copies of this petition are being served on counsel for each.

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OPINIONS BELOW

This petition for writ of mandamus and prohibition is necessitated by an order of July 14, 1980 issued by the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, purporting to interpret this Court's stay order of June 30, 1980 in the Pennhurst cases. The district court's order, and its subsequent explanatory opinion of July 29, 1980, are unreported, and are set forth in Appendices A and B, respectively. This Court's June 30, 1980 stay order is reported at 100 S.Ct. 3046 (1980).

JURISDICTION

Jurisdiction in this Court to grant the requested relief is found in the All Writs Statute, 28 U.S.C. § 1651, which provides in pertinent part as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

Petitioner Pennhurst Parents-Staff Association ("the Association") seeks a writ of mandamus and prohibition, compelling the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, to comply with this Court's order of June 30, 1980. That order stayed the court-ordered relocation of the mentally retarded residents of the Pennhurst Center for the Mentally Retarded ("Pennhurst") until resolution of the Pennhurst cases,

which raise basic questions concerning the propriety of such relief. [1/] This Court's stay is being circumvented by an artful district court interpretation effectively rendering the stay a nullity. [2/] The Court's exercise of jurisdiction through mandamus and prohibition is thus necessary and appropriate to give effect to its earlier stay order, and to preserve the status quo and prevent irreparable injury.

The questions now before the Court in the Pennhurst cases relate to the source and nature of the federal courts' authority to mandate the kind of care that states will provide for the mentally retarded. The Association and the other petitioners contend that the federal courts lack authority to enforce independent determinations compelling placement of the mentally retarded in "community living arrangements" ("CLAs"), as was authorized by the decision below, and that the courts below exceeded their lawful authority by ordering the Commonwealth of Pennsylvania and the Pennsylvania counties to establish and fund appropriate CLAs for Pennhurst residents.

As the Association's earlier Memorandum In Support Of Motion To Stay Orders Of The United States District Court

1/ The cases have not been scheduled for argument as of this date. Briefs for petitioners and respondents have been filed, however, and the Association has been advised that the cases are likely to be set for argument in early December, 1980.

2/ Since the basic question here presented relates to an interpretation of the Court's earlier stay, the Association has lodged with the Court copies of its papers in support of its earlier motion for stay. If the Court deems the district court's interpretation of its June 30, 1980 stay order to be correct, the Association submits that the circumstances presented in its earlier stay motion of June 20, 1980 and in the instant memorandum and related papers warrant an expansion of that stay order. See Part C, infra.

for the Eastern District of Pennsylvania (hereinafter "Association's Memorandum") indicated, the district court originally had ordered that Pennhurst be closed entirely. See Halderman v. Pennsylvania State School & Hospital, 446 F.Supp. 1295 (E.D. Pa. 1978), aff'd in part, Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980). Although the Third Circuit subsequently reversed that portion of the district court's ruling, it nevertheless held that deinstitutionalization is the "favored approach" and affirmed the appointment of a Special Master to monitor the creation of new CLAs for Pennhurst residents. It additionally ruled that an individual placement determination be made for each Pennhurst resident, and that all such determinations should reflect a "presumption that individviduals should be placed in CLAs." Halderman v. Pennhurst State & Hospital, 612 F.2d 84, 115 (3rd Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980). 3/

The ultimate result of the Third Circuit's decision was thus essentially the same as that of the district court. As the Association previously stated in seeking a stay of this process:

> "Obviously, such a massive bureaucratic structure [as that required by the decisions below] guided by a presumption favoring community placement of mentally retarded individuals and authorizing the court-appointed Special Master to propose CLAs will press inevitably to community placement in individual cases.

3/ On remand, the district court appointed a second master, called a hearing master, to conduct hearings concerning the appropriate placement of Pennhurst residents in CLAs and to implement the presumption in favor of community care.

* * * * *

> "[W]hile the District Court's initial absolute rule was replaced by the Third Circuit's presumption, the facts demonstrate that the result is the same. Absent this Court's intervention, a substantial number of retarded individuals will be forced into community living arrangements that are not equipped to care for them before the case is resolved in the 1980 Term." Association's Memorandum, at 10, 13.

In response to the Association's earlier stay motion, this Court issued the following order on June 30, 1980:

> "Petitioners' motion for a stay of the judgment of the Court of Appeals pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.' In all other respects, the motion is denied. Mr. Justice Brennan, Mr. Justice Marshall, Mr. Justice Blackmun and Mr. Justice Powell would deny the motion." 100 S.Ct. 3046 (1980). 4/

Properly interpreted in the context in which the Association's motion was presented and resolved, this Court's order required the district court to refrain from ordering the Commonwealth of Pennsylvania and the county defendants to place Pennhurst residents in community living arrangements pending this Court's review of the Third Circuit's decision. Subsequent events demonstrate that this mandate is being ignored.

On July 14, 1980 the district court issued an order purporting to interpret the significance of this Court's stay order and outlining procedures to be followed by the court-appointed hearing master in determining whether

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4/ The Association did not seek a stay of those portions of the district court's orders that related to improvements of the Pennhurst facility. To the contrary, the Association's basic position is that state and federal funds should be used for that purpose. Indeed, one of the Association's key objections to the procedures ordered by the district court is that the massive bureaucracy drains needed funds that might otherwise be used to improve Pennhurst.

Pennhurst residents should be placed in CLAs in individual cases. See Appendix A. hereto. In a subsequent memorandum opinion, the district court explained that it interpreted this Court's order to leave intact its earlier order that the Commonwealth of Pennsylvania and the county defendants provide individualized community living arrangements for present and future Pennhurst residents. See Appendix B hereto. Moreover, according to the district court, this Court's stay order allowed it to continue to require hearings to determine in individual cases whether Pennhurst residents wished "voluntarily" to be transferred to the community living arrangements that were being offered pursuant to court order.

In light of the district court's decision, the Commonwealth of Pennsylvania and the counties continue to be ordered to provide CLAs for individual Pennhurst residents, and the court-ordered bureaucracy continues to press forward for community placement. In recent months, a hearing master appointed by the district court has conducted hearings in some 17 cases, and in all but one case has ordered placement of the Pennhurst resident in the CLA to which he or she had been designated or interim measures designed to facilitate such community placements. See Affidavit of Pamela P. Cohen, Esquire, Appendix C hereto. Moreover, although the initial hearings involved Pennhurst residents whose transfer to the CLA in question was not opposed by their parents or guardians, 5/ the hearing master recently has concluded one hearing in which both parents strongly objected to placement of their profoundly retarded child in a CLA by determining

5/ In many instances, the Pennhurst resident did not have a parent or guardian to express an objection.

that the transfer was "voluntary" because, in his opinion, the profoundly retarded 19 year old in question would have opted for placement in the CLA if he were competent to speak for himself. See Report of The Hearing Master Re: Proposed Community Placement of G. W., Appendix D, hereto.

SUMMARY OF ARGUMENT

The district court's interpretation of this Court's stay order of June 30, 1980 is in error. It renders that order a virtual nullity, thereby depriving the Association's members of the important interim protections that the Court intended to confer. This Court's order was clearly intended to prohibit court-ordered relocation of Pennhurst residents until after the decision in the Pennhurst cases. The district court's imposition of a "voluntariness" inquiry is a meaningless diversion, and does not mitigate the fact that that court and the bureaucracy it has created are acting in clear contravention of this Court's stay order of June 30, 1980. Accordingly, this is an instance in which the lower court has mistaken or misconstrued this Court's mandate, and where the exercise of a writ of mandamus and prohibition is necessary to assure compliance with the Court's order. Cf. Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-428 (1978).

ARGUMENT

This Court will soon hear oral argument in the Pennhurst cases, which present broad-ranging questions related to the

federal courts' authority to order the displacement of mentally retarded individuals from Pennhurst. The position of the Association and the other petitioners in that case is that neither federal law nor the laws of the Commonwealth of Pennsylvania establish a right to "appropriate treatment" in "the least restrictive environment" for the developmentally disabled that can be enforced through private litigation, and that the district court lacked the authority to require the Commonwealth and the Pennsylvania counties to provide CLAs and appoint a master to determine the appropriate community placement for each current and potential Pennhurst resident. If that position is accepted, all of the substantial dislocation that is presently underway pursuant to court order will have been unauthorized. Unfortunately, however, much of that dislocation may be irreversible.

A. The Court's Stay Was Intended To Preclude Court-Ordered Community Placements Until The Pennhurst Case Is Resolved.

The basic question presented by this petition relates to the intended scope of the Court's stay order of June 30, 1980. If the Association's interpretation of the Court's order is correct, the issuance of a writ of mandamus and prohibition necessarily should follow. The same irreparable injury that prompted issuance in the stay in the first instance certainly mandates that it be complied with now.

As the Association's Memorandum indicated, the district court has established a large and expensive bureaucracy, designed to replace Pennhurst with a system of dispersed CLAs throughout Pennsylvania. See Association's Memorandum, at 7-10. The entire bureaucratic process tilts inevitably

toward placement of Pennhurst residents in CLAs, since it is guided by the Third Circuit's presumption favoring community placement, and since the district court's procedures require that anyone opposing community placement establish that Pennhurst would be more beneficial than the particular CLA that has been selected and funded prior to the time of the hearing. The Association further pointed out that the court-ordered bureaucracy would exact considerable displacement and cost substantial sums of money that might better be used for improving Pennhurst rather than destroying it. Finally, affidavits submitted in support of the Association's stay motion illustrated that the district court's bureaucracy had exacted a substantial toll in human terms as well, and that it threatened to continue to exact such a price if not stayed pending the Court's consideration of the legal foundation on which it rests.

The Association's stay motion was directed at specified portions of the district court's orders designed to establish mechanisms for the replacement of Pennhurst with a system of CLAs. Thus the Association sought a stay of the portions of the district court's order of March 24, 1978, as amended, that required the Commonwealth of Pennsylvania and the counties to provide suitable community living arrangements for Pennhurst residents, and that established the Office of the Special Master. The remaining portions of the district court orders sought to be stayed likewise related to the transfer of Pennhurst residents to CLAs and to the court-ordered bureaucracy created to implement that goal. The Association also sought a stay "of all future orders of the

district court insofar as they relate to the transfer of people from Pennhurst and/or to the utilization of the Special Master . . . ."

This Court chose to cast its stay order in broad terms rather than deal with the specific details of the Association's requested relief. Thus, the Court's order stayed the judgment of the court of appeals "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements,'" and stated that "[i]n all other respects," the Association's motion was denied. The question here is what the Court meant by its stay order. Clearly, there is only one answer: the Court intended to stop all judicially-ordered transfers of Pennhurst residents until it could decide whether the federal courts have the authority to order such relief.

The district court's determination that this Court's order was designed only to stay those transfers that are not "voluntarily" accepted by the Pennhurst resident renders the stay essentially meaningless, and leaves intact the massive bureaucracy that pushes steadily to dismantle Pennhurst while questions regarding the legality of that process remain to be decided. Virtually all of the judicial compulsion remains, and the "voluntariness" hearings at the end of this process are nothing more than cumbersome charades in which the master's determination whether the Commonwealth and county defendants have satisfied the court's order to provide a suitable CLA is disguised in terms of whether a mentally incompetent person would "voluntarily" accept that CLA if he or she could voice an opinion in the matter.

The district court itself has earlier acknowledged that "voluntariness" is a meaningless concept in this context, 6/ and experience has proven him correct. In virtually all cases, the hearing master is forced to speculate on this issue, since the profoundly retarded residents of Pennhurst cannot understand the issue, much less voice such judgments for themselves. The hearing master makes these determinations after a cumbersome and expensive hearing, obviously involving considerable trauma to the opposing parents. Moreover, recent proceedings conducted by the hearing master are rendered even more absurd by his practice of appointing counsel who represents the plaintiff class below to "represent" the views of the Pennhurst resident and oppose the position of that resident's parents. See Report of the Hearing Master Re: Proposed Community Placement of G. W., Appendix D, at 4-5; Report of the Hearing Master Re: Proposed Community Placement of P. T., Appendix D, at 3-4; Affidavit of Pamela P. Cohen, Esquire, Appendix C hereto. 7/

6/ The district court has earlier expressed the view that, due to the mental disabilities of many Pennhurst residents, "the notion of voluntariness in connection with admission as well as in connection with the right to leave Pennhurst is an illusory concept." Halderman v. Pennhurst State School & Hospital, 446 F.Supp. 1295, 1311 (E.D.Pa. 1978), aff'd. in part 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980). It is hard to understand why the notion of "voluntariness" is any more real a concept when used to determind whether a Pennhurst resident might wish to be transferred to a CLA, and the district court's order and memorandum opinion fail to provide any explanation in that regard.

7/ For example, the hearing master appointed David Ferleger, Esquire to "represent" the profoundly retarded Pennhurst resident in the G. W. hearing. The Pennhurst resident could not understand the issues at stake in the hearing, however, and was only able to attend a portion of those hearings. Thus, Mr. Ferleger's "representation" of the Pennhurst resident's position was and could be nothing more than advocacy for the community placement of the Pennhurst resident, and continued support for the Third Circuit's presumption favoring community placement for all Pennhurst residents. Indeed, (cont. next page)

Equally important, the district court continues to order the Commonwealth of Pennsylvania and the counties to develop and fund CLAs for present and prospective Pennhurst residents, and valuable resources continue to be drained to support an illegal court-ordered bureaucracy whose essential role is to replace the Commonwealth, the counties and the parents as the decisionmakers in this difficult area. The judicial coercion the Association challenged in its initial stay motion thus remains: State and county officials are compelled to work toward community placement of all present and future Pennhurst residents, and Pennhurst residents are being railroaded in that direction over the objection of their parents.

B. The Issuance Of A Writ Of Mandamus And Prohibition Is Necessary And Appropriate To Enforce This Court's Earlier Stay Order.

The precise relief sought in this case is a writ of mandamus and prohibition, directed to the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, compelling that court's compliance with this Court's earlier stay order. In view of the history

(cont. from previous page) the hearing master instructed Mr. Ferleger to "advocate for G. W.'s wishes insofar as they could be determined, and otherwise be guided by the presumption in this case in favor of placing mentally retarded persons in the community . . . ." Report of The Hearing Master Re: Proposed Community Placement of G. W., Appendix D, at 4-5. Moreover, the master ordered the Commonwealth to pay for this "representation."

Since Mr. Ferleger has sumitted a brief in this Court maintaining that Pennhurst should be closed entirely, it is hardly surprising that he offers vigorous advocacy in favor of community placement. His basic function throughout the hearing was to oppose the parents' position and attempt to diffuse parental objection to their son's placement in the CLA to which he has been assigned.

of this matter, the Association respectfully submits that any new order from this Court should, at a minimum, specifically state the following:

1. That the district court's orders compelling the Commonwealth of Pennsylvania and the county defendants to provide suitable community living arrangements for all present and potential Pennhurst residents are stayed pending this Court's final disposition of the review of the Third Circuit's decision;

2. That the district court should require that all activities of the special master and the hearing master implementing the district court's mandate that Pennsylvania and the county defendants provide suitable community living arrangements for present and potential Pennhurst residents likewise be stayed for this period of time. 8/

Relief of this kind is necessary and appropriate to aid this Court's jurisdiction. Cf. 28 U.S.C. § 1651. Certainly nothing is more fundamental to this Court's jurisdiction than that its orders be obeyed and not circumvented by artful interpretation. Moreover, as the Court recently stated, mandamus "is available to a party who has prevailed in this Court if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . .'" Vendo Co. v. Lektro-Vend Corp., supra, 434 U.S. at 427,

8/ The Commonwealth of Pennsylvania and the county defendants would remain free to offer suitable community living arrangements for individual Pennhurst residents, if, in their unfettered judgment, that is appropriate. The difference, however, would be that the basic judgments on these issues would be returned to the Commonwealth, the counties and the concerned parents until this Court resolves questions relating to the federal court's authority to displace them in that regard.

quoting United States v. Fossatt, 21 How. 445, 446 (1859); see also Stern & Gressman, Supreme Court Practice (5th ed. 1978), at 630-632, and cases cited therein. This is an appropriate case for the exercise of this Court's powers. 9/

The same considerations that prompted this Court to grant the stay in the first instance militate even more forcefully for additional relief to assure that the order is honored. The irreparable injury justifying the initial stay is still present, and events have proven that the threats spelled out in the Association's initial stay motion are real and not imaginary. Indeed, circumstances warranting the stay are even more compelling now than before; not only have the injuries identified in the Association's earlier motion continued, this Court's order has been effectively ignored.

9/ The Association unsuccessfully opposed the district court's interpretation of this Court's order below, but it did not feel compelled to seek correction of that decision under it could assess the impact of that decision as it affected the interests of the Association and its members. That impact is now clear, particularly since the hearing master has now begun to order community placement of the children of Association members. The Association's position in the District Court was that this Court's stay orders prohibited all transfers from Pennhurst. The Commonwealth of Pennsylvania urged that this Court's order prohibited court-ordered transfers only, and that the Commonwealth remained free to transfer Pennhurst residents if, in its independent view, that was considered to be appropriate. On reflection, the Association agrees that the Commonwealth's interpretation is the correct one, and that is the position it urges here. Since this position has been explicitly rejected by the district court, it would be futile to renew the Association's modified position in that forum. Furthermore, since the basic question here presented relates to the proper interpretation of an order of this Court, the Association feels that the proper action is to bring the issue to this Court rather than to the Court of Appeals. The district court's erroneous interpretation of this Court's order does not relate to the jurisdiction of the Court of Appeals, cf. 28 U.S.C. §1651, and thus that court cannot grant the requested relief. Cf. Rule 27.2(a), Supreme Court Rules

C. Alternatively, This Court Should Modify And Expand Its Stay Of June 30, 1980.

If the district court's interpretation of the intended scope of this Court's order of June 30, 1980 is correct, the Association respectfully submits that the Court should reconsider that order and expand it to specifically stay the portions of the district court's orders that are identified in the Association's stay motion of June 20, 1980, which has been lodged together with this petition. In addition, the Court should stay the district court's recent order of July 14, 1980.

The Association's earlier Memorandum urged that a stay was required in order to preserve the status quo until this Court resolved issues related to the federal courts' power to require the kinds of sweeping remedial relief here at issue. E.g., Association Memorandum at 1,3. That necessity remains; the attached affidavit of Pamela Cohen, Esquire confirms that the court-ordered bureaucracy continues to work to place Pennhurst residents in CLAs. To date, a hearing master acting under powers conferred by the district court's orders has conducted hearings in some 17 cases. In all but one of those cases, the hearing master, purporting to act under the fictional "voluntariness" standard, has ordered placement of the Pennhurst resident in a CLA, or has ordered intermediate steps toward that end. In only one case has the hearing master determined that the Pennhurst resident's transfer to a CLA would not be "voluntary," and

even then he ordered continued efforts to resolve the parents' objections to the CLA at issue.

The Association's earlier memorandum also noted that the bureaucracy and procedures ordered by the district court would cost substantial sums of money that cannot be recovered in the event this Court determines the entire process to be unauthorized. Association Memorandum at 9-10. That injury likewise continues; the Commonwealth and the county defendants are still being ordered by the district court to provide suitable community living arrangements for present and future Pennhurst residents, and they continue to be compelled to expend funds for that purpose and to fund the court-ordered special master and hearing master and their staffs. To date, the Commonwealth's expenditures related to the special master's and hearing master's offices exceed some $1.8 million, and the Commonwealth anticipates continuing monthly expenses of some $60,000 for the special master's activities and some $10,000 for those of the hearing master. See Affidavit of Pamela P. Cohen, Esquire, Appendix C. Thus, funds that might otherwise be devoted to improving Pennhurst are instead continuing to be used to support a court-ordered bureaucracy that is dedicated to its dismemberment.

Finally, the Association earlier pointed out that the entire community placement process would exact a devastating toll on the persons involved. In the Association's view,

those fears are being confirmed. Indeed, one Association member who submitted an affidavit stating that she feared that her son would be transferred to a CLA over her objections has now seen that threat materialize. See; Affidavit of Carol Yarrow, contained in Appendix C hereto; Report of the Hearing Master Re: Proposed Community Placement of G. W., contained in Appendix D, hereto. This member has now participated in a traumatic hearing before the hearing master, only to find that her views, and the views of her former husband, were to be ignored because the hearing master concluded that their son would have ignored those views himself if he were competent to reach that judgment.

The so-called "voluntariness" hearings are a facade, consisting of nothing more than the hearing master's attempt to assure himself that the particular CLA is adequate for the Pennhurst resident. See generally Reports of the Hearing Master Re: Proposed Community Placements of G. W. and P. T., which are set forth in Appendix D hereto. As the hearing master has acknowledged, he personally favors community placement, see Report of the Hearing Master Re: Proposed Community Placement of G. W., at 6, and he presumes that each community placement is voluntary "in the absence of any indication to the contrary." Id., at 12. As an examination of the opinions in the two opposed cases will confirm, the hearing master gives the parents' views variable weight, depending on the extent to which they happen to suit his particular views. Finally, even in the one case in which the hearing master found the proposed transfer to be "involuntary" he ordered relief that is obviously designed to precipitate a second

hearing in which the proposed transfer can be found to be "voluntary." See Report of the Hearing Master Re: Proposed Community Placement of P. T., Appendix D, at 23-24. The court-ordered bureaucracy presses forward toward the inevitable community placement of Pennhurst residents.

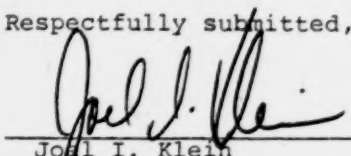
In sum, events have proven that clearly delineated relief is necessary to protect against the injuries spelled out in the Association's earlier motion for stay. The Association urges, therefore, that, if a writ of mandamus and prohibition does not issue, the Court should issue a modified stay in conformity with the Association's motion of June 20, 1980, and that the Court likewise stay the July 14, 1980 order of the United States District Court for the Eastern District of Pennsylvania that is set forth in Appendix A hereto.

CONCLUSION

For the reasons set forth herein, the Pennhurst Parents-Staff Association respectfully urges that a writ of mandamus and prohibition issue to the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, compelling that court's compliance with this Court's order of June 30, 1980. In the alternative, the Association requests that this Court stay the district

court's order of July 14, 1980, and that the Court modify its previous order of June 30, 1980 to grant the full relief previously requested by the Association on June 20, 1980.

Respectfully submitted,



Joel I. Klein
David R. Boyd
H. Bartow Farr, III
Susan L. Carney
ROGOVIN, STERN & HUGE
1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036
(2020 466-6464

Counsel for Pennhurst Parents-
Staff Association

APPENDIX A: Order of the United States District Court for the Eastern District of Pennsylvania of July 14, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.,	:	
Defendants	:	
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor	:	FILED JUL 15 1980
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,	:	
Plaintiffs-Intervenors	:	NO. 74-1345

O R D E R

AND NOW, this 14th day of July, 1980, the Supreme Court of the United States having on June 9, 1980 granted certiorari in the above captioned case, and having on June 30, 1980 entered the following limited stay Order:

> Petitioners' motion for a stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is denied.

this Court hereby ORDERS that no resident of Pennhurst shall be transferred to a community living arrangement in accordance with prior Orders of this Court unless and until the Hearing Master has determined that such transfer is voluntary. The Hearing Master shall schedule a hearing for each Pennhurst resident for whom a community living arrangement has been prepared, for the purpose of determining whether the transfer is voluntary. The Hearing

ENTERED: 7/15/80

CLERK OF COURT

Master shall give five (5) days notice of such hearing to the Pennhurst resident; parent, guardian or certified advocate; county; Commonwealth; and Special Master. The Hearing Master shall prepare a report setting forth his findings as to whether the transfer is voluntary, which report shall be filed with the Court and sent to all parties within five (5) days of the conclusiong of the hearing. If the Hearing Master finds that the transfer is not voluntary, the arrangements for transferring the resident to the community shall be terminated pending further ruling by the United States Supreme Court.

RAYMOND J. BRODERICK, J.

APPENDIX B: Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania, July 29, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.,	:	
Defendants	:	
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor	:	FILED JUL 29 1980
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,	:	
Plaintiffs-Intervenors	:	NO. 74-1345

MEMORANDUM

BRODERICK, J. July 29 , 1980.

On June 9, 1980, the Supreme Court granted certiorari to review the judgment of the Court of Appeals in this case. Plaintiffs-intervenors the Pennhurst Parents Staff Association filed a motion for a stay in the Supreme Court requesting the Supreme Court to stay the following:

> 1. A stay of paragraphs 1-11 of the order of March 24, 1978, as amended, in their entirety.
>
> 2. A stay of paragraphs 12-20 of that order insofar as those paragraphs require or depend on the Special Master and other personnel and procedures established by that order.
>
> 3. A stay of the district court's order of March 5, 1979, as amended, insofar as it requires or depends on the Special Master and other personnel and procedures established by the district court's order.
>
> 4. A stay of the district court's order of June 8, 1979, as amended, in its entirety.

ENTERED: 7/30/80

CLERK OF COURT

5. A stay of section V of the April 24, 1980 order in its entirety.

6. A stay of all future orders of the district court insofar as they relate to the transfer of people from Pennhurst and/or to the utilization of the Special Master, including but not limited to the district court's proposed order of May 20, 1980.

On June 30, 1980, the Supreme Court entered the following Order:

> Petitioner's motion for a stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is denied.

Pursuant to the Supreme Court's stay order, this Court on July 14, 1980 ordered that:

> . . . no resident of Pennhurst shall be transferred to a community living arrangement in accordance with prior Orders of this Court unless and until the Hearing Master has determined that such transfer is voluntary. The Hearing Master shall schedule a hearing for each Pennhurst resident for whom a community living arrangement has been prepared, for the purpose of determining whether the transfer is voluntary. The Hearing Master shall give five (5) days notice of such hearing to the Pennhurst resident; parent, guardian or certified advocate; county; Commonwealth; and Special Master. The Hearing Master shall prepare a report setting forth his findings as to whether the transfer is voluntary, which report shall be filed with the Court and sent to all parties within five (5) days of the conclusion of the hearing. If the Hearing Master finds that the transfer is not voluntary, the arrangements for transferring the resident to the community shall be terminated pending further ruling by the United States Supreme Court.

On July 14, 1980, this Court also ordered that it would "hold a hearing, receive memoranda and hear oral argument . . . for the purpose of determining whether the aforementioned Supreme Court Order stays any prior Order of this Court, except as recognized in the Order of this Court dated July 14, 1980 in connection with determinations as to voluntariness of transfers from Pennhurst to Community Living Arrangements." The hearing was held on July 21, 1980; all parties presented argument, and briefs were submitted by

the plaintiffs, the Parents-Staff Association, and the Commonwealth.

Plaintiffs-intervenors the Pennhurst Parents-Staff Association argue that the Supreme Court stay bars all movement of residents from Pennhurst, whether voluntary or involuntary. They further argue that all planning for community placement of Pennhurst residents is also stayed.

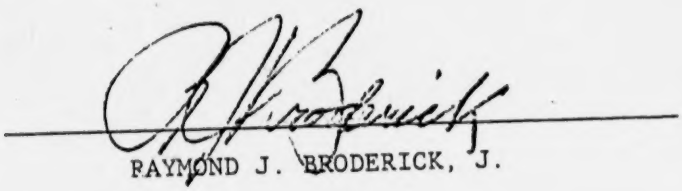
The Commonwealth and Counties take a slightly different position. They concede that this Court retains authority to monitor the conditions at Pennhurst, and to continue the services of the Special Master in that process. Unlike the Parents-Staff Association, the Commonwealth and Counties do not contend that residents who wish to leave Pennhurst are condemned to remain there for the period of the Supreme Court stay. They argue, however, that the stay has removed the authority of this Court to exercise any control over such voluntary placements. They further contend that this Court's Order of July 14, 1980 in connection with determinations as to the voluntariness of transfers violates the Supreme Court stay order. The Commonwealth, which did not join the motion for stay in the Supreme Court, believes that it and the Counties have exclusive authority over community placements as a result of the Supreme Court stay.

Original plaintiffs and plaintiff-intervenor Pennsylvania Association for Retarded Citizens agree that the only modification of this Court's prior Orders necessitated by the Supreme Court stay was accomplished by this Court's Order of July 14, 1980 regarding the voluntariness of transfers. In other words, they interpret the Supreme Court stay as barring only involuntary transfers from Pennhurst to appropriate community living arrangements.

The Court finds the plaintiffs' arguments concerning the Supreme Court stay to be the most persuasive. There is absolutely no support for the Parents-Staff Association's position that the

Supreme Court intended to close the doors of Pennhurst, forbidding anyone to leave. As to the position of the Commonwealth and Counties that voluntary transfers may proceed, but that this Court has no authority in connection with such transfers, we must look to the motion for stay and the precise wording of the Supreme Court's Order. The motions sought a stay of paragraphs 1 through 11 of the Order of March 24, 1978, as amended, which set forth specific procedures for the planning, development, and monitoring of community living arrangements. A stay of the Order of June 8, 1979, which provided specific steps for transferring the school-age residents of Pennhurst to the community, was also sought. Further, the Parents-Staff Association sought to stay Part V of the Order of April 24, 1980, which provided for individual determinations as to the appropriate habilitation for Pennhurst residents, as mandated by the Court of Appeals for the Third Circuit. If the Supreme Court had intended to terminate the involvement of this Court in the voluntary movement of Pennhurst residents to the community, it could easily have done so by specifically granting the three stay requests. Instead, the Supreme Court granted a stay of the judgment of the Court of Appeals only "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.'" We understand the word "mandate" to have its literal meaning -- that this Court cannot mandate the movement of residents from Pennhurst to the community. Nothing in the Supreme Court stay order suggests, however, that voluntary transfers may not proceed, nor that this Court may not ensure that residents and their families make informed judgments as to such voluntary placements. Furthermore, we find nothing in the Supreme Court stay order to prevent this Court, with the assistance of its Special Master and Hearing Master, from ensuring that such voluntary transfers make adequate provision for the safety and habilitation of the retarded

residents. The Court therefore sees no need to further modify its Orders as a result of the Supreme Court stay order.



RAYMOND J. BRODERICK, J.

APPENDIX C: Affidavits In Support of Petition or Motion.

IN THE SUPREME COURT
OF THE UNITED STATES
1980 TERM

In re: PENNHURST PARENTS-STAFF ASSOCIATION	)	Nos. 79-1404
	)	79-1408
	)	79-1414
	)	79-1415
	)	79-1489

AFFIDAVIT OF CAROL YARROW IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS AND PROHIBITION
OF, ALTERNATIVELY, MODIFICATION OF STAY

CAROL YARROW, being duly sworn, deposes and says:

1. I am a member of the Pennhurst Parents-Staff Association, which is a petitioner in the Pennhurst cases presently before the Supreme Court and the petitioner in this petition for writ of mandamus and prohibition.

2. My son, Gregory, is 19 years old. He is severely mentally retarded and blind, and has an intellectual age of approximately 18 months. Gregory is hyperactive, aggressive and self-abusive and requires heavy medication and constant supervision. In my opinion, Gregory is unable to understand the issues at stake in this case, or to rationally determine whether his interests would be best served by remaining in an improved Pennhurst or being placed in a court-ordered community living arrangement (CLA).

3. In June of 1980, I submitted the attached affidavit in support of the Association's motion for a stay of certain orders of the United States District Court for the Eastern District of Pennsylvania designed to move residents of Pennhurst to individual community living arrangements (CLAs).

4. In that affidavit, I expressed my personal concern that my son would be forced into a CLA that was not adequate to care for him, notwithstanding my opposition.

5. My previous affidavit also expressed my opinion that the result of the structures established by the district court would inevitably be to place my son in a CLA that was inadequate to meet his needs in spite of my views.

6. Although I had hoped and understood that the Supreme Court's order of June 30, 1980 would halt that process until the Supreme Court decides the Pennhurst cases, that has not been the result of the Supreme Court's order.

7. In September of 1980, a hearing master appointed by the district court conducted hearings for approximately 3 days regarding the placement of my son in the CLA to which he had been assigned pursuant to the district court's orders.

8. I and my former husband appeared, represented by counsel, and opposed our son's placement in this CLA for a number of reasons. I particularly opposed our son's transfer to the CLA prior to the Supreme Court's decision in the Pennhurst cases, for I believe that such a disruptive change should not be forced upon my son unless it is clear that the federal courts have the authority to order such measures.

9. Over our objections, the hearing master appointed one of the attorneys who represents the class of plaintiffs that is attempting to close Pennhurst, purportedly to represent our son's viewpoint in this proceeding. The hearing master ruled that the cost of that representation was to be borne by the Commonwealth of Pennsylvania, and denied our motion for a similar compensation award for our counsel.

10. Throughout the hearing, the attorney who purportedly represented our son challenged the validity of my views and the views of my former husband regarding our son's welfare, and argued in favor of his placement in the designated CLA.

11. At the close of the hearing, the hearing master ruled that my son's placement in the designated CLA was

"voluntary" because the hearing master believed that my son would opt for placement in that CLA if he were able to speak for himself. The hearing master ordered that my son begin initial visits at the CLA as a prelude to a final order permanently placing him in the CLA. Moreover, the hearing master indicated that he thought it most unlikely that the information obtained in these preliminary visits would alter his opinion regarding the "voluntariness" of my son's placement in the CLA. My counsel has filed exceptions to this ruling.

12. Based on this experience, I can state that the Supreme Court's order of June 30, 1980 has offered no relief in my case at all, and that the consequences that I identified in my earlier affidavit are occurring, notwithstanding that order.

Carol Yarrow

Sworn to and subscribed
before me this 30 day of
October, 1980.

GEORGE D. MADONNA

OCT 30 1980

Notary Public

NOTARY PUBLIC
933 Springfield Rd., Darby, Pa. 19023
My Commission Expires March 26, 1981

IN THE SUPREME COURT
OF THE UNITED STATES
1980 TERM

In re: PENNHURST PARENTS-STAFF ASSOCIATION	)	Nos. 79-1404
	)	79-1408
	)	79-1414
	)	79-1415
	)	79-1489

AFFIDAVIT OF PAMELA P. COHEN IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION OF, ALTERNATIVELY, MODIFICATION OF STAY

PAMELA P. COHEN, being duly sworn, deposes and says:

1. I am a member of the law firm of Swenson & Cohen. Since I have represented the Pennhurst Parents-Staff Association in litigation related to the Pennhurst Center for the Mentally Retarded. In addition, I have represented parents of Pennhurst residents in proceedings conducted as a result of orders issued by the United States District Court for the Eastern District of Pennsylvania in that case.

2. To date, the Hearing Master appointed by the District Court has held seventeen (17) hearings to effectuate "voluntary" placements of Pennhurst residents in community living arrangements established as a result of the District Court's Orders in the Pennhurst case.

3. Twelve (12) proposed placements were found by the

Hearing Master to be voluntary and prompt placement in the CLA was ordered. In four (4) additional proposed placements, the counties were instructed to make further preparation so that the placements can then be declared "voluntary". Even in the one instance where the propo lacement was found to be involuntary, the county was instructed to spend an additional ninety (90) days attempting to convince the resident's parents to withdraw their opposition to the placement.

4. In two hearings, I have represented parents of Pennhurst residents who oppose the placement of their sons in the designated CLA. I represent Carol Yarrow, an affiant in this proceeding, in one such hearing process.

5. In each opposed case, the Hearing Master appointed counsel purportedly to represent the Pennhurst resident and ordered that those counsel be compensated by the Commonwealth of Pennsylvania.

6. In each case, the counsel appointed to "represent" the Pennhurst resident was counsel of record for the class that seeks to have Pennhurst closed, and in each case that counsel vigorously opposed the position taken by the resident's parents in the proceeding.

7. In each case, the Hearing Master denied my motions to remove appointed counsel on the grounds of bias and on other grounds, and also denied my motions to be compensated on the same basis as were the counsel appointed to "represent" the Pennhurst resident.

8. In Carol Yarrow's case, the Hearing Master ruled that placement in a CLA was "voluntary", notwithstanding the expressed opposition of Mrs. Yarrow and her former husband, the father of the child in question, I have filed exceptions to that ruling on the parents' behalf.

9. In the other opposed case, the Hearing Master ruled that placement in the CLA was not "voluntary" due to the unresolved nature of certain parental objections. The Hearing Master ordered the county to reserve a place in the designated CLA for ninety (90) days, however, and to work with the Pennhurst resident's parents to resolve their objections.

10. I understand that the Commonwealth of Pennsylvania has already been required to pay approximately $1.8 million for operation of the Special Master's office, and approximately $60,000.00 for the operation of the Hearing Master. I further understand that Pennsylvania has anticipated continuing monthly

expenditures of approximately $62,000 and $9,900 for the operations of the Special Master and Hearing Master for the remainder of this year.

Pamela P. Cohen

PAMELA P. COHEN

Sworn to and subscribed before
me this 31 day of October, 1980.

Sondra S. Katz

Notary Public

SONDRA S. KATZ
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 5, 1983

APPENDIX D: Reports of the Hearing Master In Opposed Cases -

a. Report of the Hearing Master Re: Proposed Community Placement of G. W. (October 15, 1980)

b. Report of the Hearing Master Re: Proposed Community Placement of P. T. (October 8, 1980)

HEARING MASTER
Halderman v. Pennhurst
UNITED STATES DISTRICT COURT

Re: Proposed Community Placement Of G.W.

No. 80-P-16
(Civ. Act. No. 74-1345)

REPORT OF THE HEARING MASTER

1. Procedural History

On September 10, 1980, the Hearing Master received from the MH/MR Administrator of Chester County a notice of a proposed community placement of G.W., a resident of Pennhurst, dated September 9, 1980. Pursuant to the Order of July 14, 1980, the Hearing Master, on September 10, 1980, notified G.W., his parents, his certified advocate, Chester County, the Commonwealth, and the Special Master of a hearing to be held in the Hearing Master's office on September 18, 1980, to determine the voluntariness of the proposed transfer of G.W. from Pennhurst to a community living arrangement in Chester County. At the request of parents' counsel, the hearing was rescheduled for September 29, 1980, and was held on that date and on September 30 and October 7, 1980.

The hearing was attended by G.W. (first day only) and David Ferleger, Esq., the attorney appointed for him by the Hearing Master's order of September 22, 1980; by G.W.'s certified advocate, Jeanette Goldberg; by G.W.'s parents, R.W. and Mrs. C.Y., and their attorney, Pamela P. Cohen, Esq.; and by the County and the Office of the Special Master. In addition, although the Commonwealth has declined to participate voluntarily as a party to these proceedings (see Deputy Secretary Howse's letter to me of September 5, 1980), the Regional Commissioner of Mental Retardation, Dr. Russell Rice, appeared pursuant to subpoena on September 29 and 30,

1980, along with his attorneys, Stanley Slipakoff, Esq. (first day), and Jules Henshell, Esq. (second day). Dr. Rice was excused from further attendance at the hearing when a tentative agreement was reached during the second day as to attendance of Commonwealth witnesses in this and other cases. */

2. Preliminary Matters

A number of motions were made and ruled upon at the outset of the hearing, and their disposition will be included here as part of the Hearing Master's report. First, G.W.'s parents moved (with the Commonwealth's concurrence) to terminate the hearing as being in violation of the partial stay granted on June 30, 1980, by the United States Supreme Court in Halderman v. Pennhurst State School and Hospital. This motion was denied on the ground that the Hearing Master, even if he were so inclined, lacks the authority to overrule the District Court's Order of July 14, 1980, which requires hearings to determine the voluntariness of each proposed transfer of a Pennhurst resident to a community living arrangement.

The parents then moved, with the support of the Commonwealth, to dismiss Mr. Ferleger as the attorney for G.W. in this matter,

---

*/ Dr. Rice's presence was required by the Hearing Master's standing order of September 15, 1980, as well as by a subpoena served on behalf of the Office of the Special Master pursuant to that order. While the issue which occasioned the Hearing Master's standing order -- the Commonwealth's refusal to participate in my hearings, even to the extent of making witnesses available on short notice when needed -- was apparently resolved during the pendency of this matter, final resolution awaits written confirmation of the Commonwealth's position. The delay in this promised confirmation is becoming a matter of some concern to the Hearing Master.

on the basis that the Hearing Master has no authority to appoint counsel for Pennhurst residents in these proceedings. The Hearing Master disagrees. Whatever may be the import of the reference to retention or provision of attorneys in the Order of April 24, 1980, at 65, and whatever may be the obligation of the Commonwealth thereunder, the Hearing Master believes he has the authority to appoint counsel under Rule 53(c), F.R.Civ.P., which states in relevant part that

> . . . the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order [of reference].

In the instant case, where two other parties to the hearing are represented by counsel, the Hearing Master believes appointment of an attorney for the Pennhurst resident is necessary to ensure a balanced presentation of the issues and a proper recognition of the resident's separate legal interest.

The Commonwealth also contended that the presence of a certified advocate for G.W. in this case made appointment of counsel unnecessary. While this argument has some theoretical appeal, in practice the Hearing Master has found that the certified advocates appointed for certain class members in Halderman v. Pennhurst cannot provide the same level of representation as attorneys can in the somewhat formal setting of a voluntariness hearing. Thus the motion to dismiss G.W.'s appointed counsel was denied.

The parents further sought, again with the Commonwealth's support, to disqualify Mr. Ferleger specifically as appointed counsel for G.W., on the basis of (1) his alleged unfamilarity with G.W., (2) an alleged conflict arising from the asserted identity of Mr. Ferleger's arguments in Halderman with those advanced by the Pennsylvania Association for Retarded Citizens (a plaintiff in Halderman), and (3) the purported conflict caused by Mr. Ferleger's role as counsel of record for certain plaintiffs in Halderman v. Pennhurst.

The Hearing Master is satisfied with Mr. Ferleger's efforts to acquaint himself with the facts of G.W.'s case, and believes his performance in the hearing should have dispelled any doubts about the adequacy of his preparation. Further, I accept Mr. Ferleger's statement that he does not represent PARC or any of its affiliates; even if he did, the relevance to the instant case would be unclear. As for the purported conflict between Mr. Ferleger's anti-institutional stance on behalf of the plaintiff class in the main Halderman litigation and his representation of an individual class member in this proceeding, the Hearing Master fails to see any conflict whatsoever. On the surface, it seems entirely proper for an attorney for the plaintiff class in a lawsuit to represent a member of that class in a hearing which arises from and is part of that litigation. Moreover, regardless of what Mr. Ferleger's views may be in any other context, the Hearing Master's instructions were that he advocate for G.W.'s wishes insofar as they could be determined, and otherwise be guided by the presumption in this case in favor of placing mentally retarded

persons in the community, see Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979); Order of April 24, 1980, at 66 ; there has been no indication that these instructions have not been followed. While Mr. Ferleger felt it likely that some assumptions could be made about G.W.'s preference in this matter if G.W. were allowed to experience being in the community, this approach was foreclosed by the parents' decision not to allow pre-placement visits to the proposed community residence. Thus Mr. Ferleger had little choice but to advocate generally in favor of community placement.

The Commonwealth contended that designation of a guardian ad litem for G.W. would be more appropriate than Mr. Ferleger's appointment. But a guardian ad litem would be just another person seeking to determine G.W.'s "best interest" and to make the voluntariness decision for G.W. on that basis; what was needed in this hearing was not another substitute decision-maker, but rather an advocate who would press for G.W.'s separate legal entitlements. For these reasons, as well as those set forth in my order of September 22, 1980, the motion to disqualify Mr. Ferleger was denied.

A related motion was the request by the parents' attorney, Ms. Cohen, that she be compensated at the same rate ($60 per hour) as established in my order of September 22, 1980, for counsel appointed to represent Pennhurst resident G.W. This motion was denied. The Hearing Master appoints (and compensates) counsel for Pennhurst residents -- who are generally unable, financially and otherwise, to retain their own -- only in those situations where other parties can and do secure legal representation; it

would make no sense for the Hearing Master also to compensate the lawyers whose presence makes it necessary to appoint counsel in the first place. The Hearing Master will not discourage parents and governmental units from seeking legal representation, but I see no obligation to provide and pay for such assistance for anyone but the Pennhurst resident.

The parents also asked the Hearing Master to recuse himself on the basis of his alleged personal preference for community (as opposed to institutional) programs, which preference was assertedly demonstrated by his appointment of Mr. Ferleger to represent G.W. in this matter. I can only say that my personal philosophy is entirely consistent with the Third Circuit's decision in this case -- and that if my views were different, I could and would disregard them. The question in this hearing, in any event, is not "the community" versus "the institution," but the voluntariness and appropriateness of particular living arrangements and services for a particular individual. I perceive no difficulty in deciding these issues solely on the basis of the evidence and arguments presented to me; accordingly, the motion has been denied.

The parents next moved that the Hearing Master define the concept of "voluntariness" at the outset of the hearing, so that the parties would know what evidence to present and where the burden of proof would lie. While referring to previous decisions in which some aspects of "voluntary" transfers were discussed, the Hearing Master declined to decide the issues which might arise in the instant matter before hearing the evidence and the arguments of counsel, if any.

Referring to Exhibits GW-9, GW-10, and GW-11, Mr. Ferleger noted that there had been no mediation of the parents' evident objections to G.W.'s proposed community placement -- despite the requirement of the Order of April 24, 1980, at 64, that the Commonwealth attempt to mediate such disagreements -- and he moved that such mediation be provided. Ms. Cohen stated, and Ex. GW-11 confirms, that Pennhurst superintendent George Kopchick, the Commonwealth's designated mediator, has been unwilling to intervene in this and other cases where parents are opposed to "the whole concept of community placement." Indeed, as Dr. Rice, the Regional Commissioner of Mental Retardation, indicated, at the time this matter was pending there was no agreed upon mediation procedure in effect, even though one had been developed by the Commonwealth, with the involvement of the Special Master and the Hearing Master, several months ago. This being the case, Mr. Ferleger withdrew his motion.

After hearing the evidence in this case, the Hearing Master is extremely doubtful that any type of mediation would have eliminated R.W.'s and Mrs. C.Y.'s fundamental opposition to G.W.'s proposed community placement; nevertheless, if only for G.W.'s sake, it should have been attempted. The lack of prior mediation meant, in effect, that it went on in the context of the hearing, and that the County, Mr. Ferleger, the Special Master, and the Hearing Master were forced to discharge this responsibility of the Commonwealth toward G.W. and his parents. While Dr. Rice's candor and directness on certain points was much appreciated, the combination of the absence of mediation and the Commonwealth's

refusal to participate meaningfully in these hearings has the effect, at a minimum, of making them far more burdensome for the other parties that would otherwise be necessary.

3. Background

G.W. is a 19-year-old resident of Pennhurst who is classified as profoundly mentally retarded and who is totally blind, mildly self-abusive (he bites his hands, wrists, and arms), and very infrequently, if ever, assaultive toward other clients or staff. He is ambulatory (though somewhat fearful and hesitant because of his blindness), essentially non-verbal, and in need of assistance with some of his self-help skills although he is able to dress and undress by himself. G.W. is thought to have a seizure problem, but its nature and severity are unclear; he has also been excessively sleepy lately, which may be due to his medication regime. For these reasons, the County has proposed an in-depth neurological and psychiatric evaluation by a community specialist, but R.W. and Mrs. C.Y. have refused to allow G.W. to leave the Pennhurst grounds for this purpose. Although G.W. does not speak, he can respond to two-step commands and can communicate to some extent by means of gestures, growls, and facial expressions. In summary, despite his severe handicaps, G.W. has acquired many skills and possesses the potential to learn even more; as his Pennhurst casework supervisor testified, there is nothing about G.W. himself that would prevent his being placed in the community.

The County has now prepared an individual habilitation plan for G.W. (Cty. Ex. 3), and on the basis of that plan (developed with the involvement of his parents), it proposes to transfer him

from Pennhurst, where he has lived for seven years, to a community living arrangement near Paoli, Pennsylvania.

The proposed residence for G.W., to be operated by Community Homes, Inc., is a split-level home designed to accommodate three mentally retarded persons; since two of these persons (including G.W.) are blind, the residence has been extensively adapted by the addition of railings, non-visual "cues" such as abrasive material at the top and bottom of stairways, and rough-textured "trails" painted on the walls, which guide residents to bedrooms and bathrooms. Many of these modifications resulted from suggestions by a visually handicapped occupational therapist who works on G.W.'s unit at Pennhurst, the County's vision specialist, and the parents. G.W. and the others would have one-to-one staffing when present in the residence during the day,*/ and one staff worker would be on duty at night, with relief or backup on call within ten minutes.

In the County's opinion, before G.W. could move into the residence on a permanent basis, he would need extensive pre-placement visits with the involvement of Pennhurst staff with whom he is familiar (a Ms. Edna Plasko was mentioned frequently in this regard). Such visits have not been permitted by R.W. and Mrs. C.Y., since they requested termination of all pre-placement activity on June 1, 1980. (On June 10, 1980, they also prohibited further visits by County or community provider staff to G.W. at Pennhurst.)

If G.W. were placed in the community, there would be no change in his major day program, since he would continue to

*/ All current staff are trained in seizure control and are experienced with severely or profoundly retarded clients and those with behavior problems; two of the five have prior experience with the visually handicapped.

attend the Liberty Forge intermediate unit, the component of the Chester County public school program for handicapped children which is attended by most of Pennhurst's school-age residents.

The community residential and day program for G.W. resulted from an extensive planning and evaluation process (see Cty. Ex. 4, Ex. P-1, P-2, P-3) and is reflected in a transitional individual habilitation plan developed at a meeting on April 11, 1980, which was attended by G.W.'s parents, his certified advocate, prospective community providers, and G.W.'s County case manager Tim Greusel */ (Cty. Ex 3), and at an addendum meeting on June 8, 1980, between a Community Homes representative and Mr. Greusel which the parents did not attend. The plan has been approved by the Office of the Special Master as offering services which will be more beneficial to G.W.'s habilitation than those provided to him at Pennhurst, to the extent that such a determination can be made without more than one brief pre-placement visit by the client to the proposed residence. G.W.'s parents continue to object to the proposed placement.

4. Voluntariness of Transfer

Under the Court's Order of July 14, 1980, implementing the Order of the United States Supreme Court dated June 30, 1980, no resident of Pennhurst may be transferred to a community living arrangement unless and until the Hearing Master determines that the transfer in question is "voluntary."

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*/ Mr. Greusel, who testified at the hearing, was questioned by parents' counsel about the fact that after being G.W.'s County case manager from June, 1979 to September, 1980, he is now an employee of Community Homes, Inc., and is in charge of the

The above mentioned orders provide the Hearing Master with no guidance as to what constitutes a "voluntary" transfer; thus the term must be interpreted and applied on a case-by-case basis. The case of G.W. involves the application of this concept where the Pennhurst resident in question is 19 years old and is thus no longer a minor, has no legal guardian,*/ is unable to communicate his preference in the context of a hearing, and has not been afforded the opportunity to manifest his feelings in some other manner through exposure to the proposed community setting. Determining voluntariness in such a case is obviously not a simple exercise.

First, it should be clear that voluntariness is a consideration here solely because of the District Court's order interpreting the Supreme Court's partial stay. Under Pennsylvania law, see 50 P.S. §§4402, 4403, 4420 and implementing regulations, 3 Pa. Bull 1840 (1973), 6 Pa. Bull. 2884 (1976), Commonwealth officials

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(footnote continued)

residence proposed for G.W. It is clear, however, that the residence for G.W. was selected by the County long before Mr. Greusel was contacted regarding employment by Community Homes. And in fact, it might work to G.W.'s advantage to have his former case manager in charge of his community residence.

*/ Mrs. C.Y. said she and R.W. had not sought to become G.W.'s legal guardians because if the "experimental program" being proposed for G.W. were to fail, they would become responsible for his care, financially and otherwise. The Hearing Master does not believe that this concern is borne out by the record or by the applicable law. See 20 P.S. §§5501 et seq.

can generally discharge or refuse to admit persons whom they determine not to be in need of institutionalization, regardless of the wishes of the client or other applicant for admission. And it was clearly the case under the Order of April 24, 1980, at 63-67, that a mentally retarded person could be transferred from Pennhurst to a community living arrangement over anyone's objection, including his own, if it was determined that the CLA was more beneficial to that person's habilitation. Thus in determining voluntariness in cases such as that of G.W., the Hearing Master is essentially writing on a clean slate and not diminishing (or enhancing) a right that has an independent existence outside the immediate context.

Next, the Hearing Master has had occasion in prior cases to construe the Order of July 14, 1980, to this extent: at least in the case of adult Pennhurst residents, proposed transfers to community living arrangements should be presumed to be voluntary in the absence of any indication to the contrary. The Hearing Master hereby reaffirms that interpretation in this case. This presumption ought to be applied, in my opinion, because of the general legal principle favoring lesser over greater degrees of restriction on personal liberty, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975), and, more particularly, because of the legal presumption in all aspects of Halderman v. Pennhurst, which the Hearing Master must observe, in favor of placing mentally retarded persons in the community. Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979); Order of April 24, 1980, at 66. In light of the

foregoing general legal principle and its specific application to this case, when it is necessary to make some assumption regarding the resident's choice,the Hearing Master must presume, in the absence of any contrary indication on the record, that the resident would choose lesser rather than greater restriction and a program which is more likely to be beneficial to his habilitation rather than one which is less likely to be beneficial.

But in this case, of course, there are contrary indications in the record, emanating from G.W.'s parents; so the question becomes one of whether, how, and under what standard their objections should be evaluated. Especially since G.W. is an adult and since his parents are not his legal guardians, I do not believe that the objections of his parents, whatever their basis or their merits, must be treated as conclusive, so that the proposed transfer automatically becomes involuntary. As set forth more fully below, I do not think that total deference to the parents comports with what courts have done in similar situations or with the intention of the District Court in the instant matter.

It might be aruged that the Supreme Court's ruling in Secretary v. Institutionalized Juveniles, ___ U.S. ___, 99 S.Ct. 2523 (1979) -- which vests parents of retarded persons 18 and younger with substantial discretion over their children's admission to mental institutions -- requires the Hearing Master in this case simply to ascertain the parents' wishes and then comply with them. But I do not think Institutionalized Juveniles mandates such a result. To begin with, G.W. is neither a minor nor a person of the age covered by the Pennsylvania laws (50 P.S.

§§4402, 4403) which the Supreme Court upheld; he was not admitted to Pennhurst under those provisions but rather was committed by a court under 50 P.S. §4406 as then in effect. But even if Institutionalized Juveniles were to be applied by analogy to this proceeding, the result is not the same.

Although the word "voluntary" is used in both Institutionalized Juveniles and the Order of July 14, 1980, the question in this hearing is of a different character than that in proposed admissions or commitments; the voluntariness question here is what is the desired or preferred course of action, i.e., what does someone want -- rather than what is clinically necessary or appropriate, i.e., what should be done to or with somebody. And in any event, the statutory parental discretion approved in Institutionalized Juveniles was far from absolute; as the Supreme Court noted, the law satisfied due process requirements in part because facility directors retained the authority to deny admission (in the face of parental application and medical or physchological concurrence) if they determined that institutionalization was not required. Id. at 99 S.Ct. 2527-2528. Here, the professional determination has been made that G.W. does not need to remain at Pennhurst and, indeed, that he can probably benefit from community placement; thus, were it not for the Order of July 14, 1980, the holding in Institutionalized Juveniles would, if anything, point toward his release. */

*/ Mr. Ferleger argued forcefully at the hearing that G.W.'s initial commitment under 50 P.S. §4406 was illegal, and that he could not now be court committed under the prevailing standard. 6 Pa. Bull. 2884 (1976). While this may be so, it does not affect the determinations the Hearing Master is required to make in this case as to the voluntariness and, if necessary, appropriateness of the proposed community placement. See Ex. GW-1 to GW-6.

Despite the foregoing observations, I do not believe it would be proper for me to disregard entirely the objections of R.W. and Mrs. C.Y. Under the District Court's Orders of April 24, 1980, and July 14, 1980, parents of Pennhurst residents are clearly intended to participate in the planning and evaluation of proposed community placements, regardless of the age of the clients. Moreover, it is plain that concerned parents of Pennhurst resident of all ages were intended to have, and should have, a role in determining whether proposed community placements are voluntary. What that role should be in this case obviously depends on the standard for determining voluntariness.

After extensive research and consideration, the Hearing Master has determined that what he must do in this case is to make a substituted judgment as to what G.W. would choose if he were competent to do so -- to "decide what [he] would choose, if he were in a position to make a sound judgment." In re Weberlist, 360 N.Y.S. 2d 783 (Sup. Ct. N.Y. 1974). This approach has been utilized by the courts since 1816, when an English court disposed of an incompetent person's estate by substituting itself as nearly as possible for that person and basing its decision on the same factors and considerations that would have been relevant to the incompetent. Ex parte Whitbread, 35 Eng. Rep. 878 (1816). It has also been used by some courts to authorize the donation of kidneys by minors or legally incompetent adults to family members suffering from renal disease. Strunk v. Strunk, 445 S.W. 2d 145 (Ky. Ct. App. 1969); Howard v. Fulton-DeKalb Hospital Authority, 42 U.S.L.W. 2322 (Ga. Sup. Ct., November 29, 1973);

but see In re Richardson, 284 So. 2d 185 (La. App. 1973), cert. den. 284 So. 2d 338 (La. 1973); In re Pescinski, 226 N.W. 2d 180 (Wis. 1975).

I believe this approach is preferable to allowing G.W.'s parents an absolute veto, or to imposing my own beliefs upon G.W., because it gives meaning to the concept of voluntariness while still according to G.W. (and others) "the fullest possible expression to [their] character and circumstances." Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417, ___ (Mass. 1977). As the court said in Saikewicz about a legally incompetent retarded person being offered life-saving medical treatment, it is not enough to determine the "best interests" of a voiceless individual or to make decisions for that individual on the basis of what a so-called "reasonable man" might do:

> The "best interests of an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons. It does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others . . . . [T]he State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons. . . . To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.

Id. at 428.

In attempting to determine whether G.W. would choose to remain at Pennhurst or move into the community, it is appropriate

to give weight to his parents' objections even though they are not binding. Certainly, the parents of a Pennhurst resident may be well situated to assist the Hearing Master in determining what decision their child would reach. But all parental objections are not entitled to the same weight; I will determine what weight to give them on the basis of (1) the degree of the parents' involvement with the Pennhurst resident, and their familarity with his present and proposed living arrangement and services; (2) the presence in the hearing record of at least some evidence substantiating the parents' concerns; and (3) the extent to which the parents' objections are based upon factors or issues which the resident himself would consider if he were able. Of course, I will also consider any actual manifestation of the Pennhurst resident's reactions or desires, as well as other relevant information from whatever source, in making my substituted judgment on the resident's behalf.

In this case, since there was only one brief pre-placement visit, there is no direct information as to G.W.'s reaction to the proposed community residence. Thus the Hearing Master must look primarily to the concerns expressed by the parents, and evaluate them under the above standard to determine what light they shed on how G.W. would make the decision himself.

First, the parents' recent involvement with G.W. has been moderate but not extensive. While no one can minimize the difficulties they endured when G.W. was living at home, or the efforts they made to find appropriate services for him (e.g., relocating the entire family in order to be near a special

school), R.W. and Mrs. C.Y. have visited G.W., at most, an average of twice a month during his stay at Pennhurst and have taken him home to visit on only one occasion. They have attended meetings regarding his individual education plan and annual program review (Ex. P-4, P-4B) while he has been at Pennhurst, and participated in the planning of his proposed community placement from August, 1979, until May, 1980 -- but for some reason, in the spring of 1980 they suddenly refused to cooperate any further. In fact, most of the information the parents presented at the hearing about supposed deficits in G.W.'s community program was acquired, not in the course of planning for possible community placement, but rather within the past few weeks -- a time period which coincides with the issuance of the County's notice of proposed placement and the scheduling of the hearing in this case.

Mrs. C.Y. visited the proposed community residence in February, 1980, before anyone lived there, suggested some structural modifications (which apparently were made), and did not return, so far as the record indicates, until she drove by the home (but did not go inside) some two weeks before the hearing. R.W. did not visit the proposed residence until three weeks before the hearing, and then went back to interview the neighbors approximately one week after that. The parents cut off G.W.'s preplacement visits after one uneventful stay of 45 minutes, and thus were unable to evaluate his adjustment or reaction to the proposed community residence. In sum, while R.W. and Mrs. C.Y. may have some acquaintance with Pennhurst, they are relatively

unfamiliar with the details of G.W.'s proposed community placement, particularly its residential component.

Nonetheless, the parents' concerns about G.W.'s proposed placement cannot be dismissed out of hand, and the Hearing Master must attempt to evaluate them as best he can. It is impossible, however, to sort out the conflicting claims as to what objections were raised at what point in time. According to the County, the parents made it clear in their initial meeting with Mr. Greusel in August, 1979, that they did not want G.W. to live in the same school district where his siblings were enrolled -- a stricture the County observed. The County also agreed at some point not to involve G.W. in activities at the YMCA which the other children might use. But on April 21, 1980, Mrs. C.Y. indicated to the County that the location of the proposed residence was nevertheless unacceptable because it was too close to her and R.W.'s homes (they are divorced). Still, planning for G.W.'s placement continued, and in May, 1980, a transitional individual habilitation plan was submitted to the parents for approval. On May 28 and June 1, 1980, R.W. and Mrs. C.Y. sent written objections to the County (Cty. Ex. 1,2); both of them mentioned, more prominently than any other concern, their disapproval of the location of G.W.'s proposed community residence -- e.g., "Location of CLA —— [G.W.] not to be involved in community activities in Malvern-Paoli and East on Lancaster Pike" (Cty. Ex. 2).

The County's understanding at the time of the hearing was that all other specific concerns mentioned by the parents in Cty. Ex. 1 and 2 had been addressed -- G.W.'s program had been

more clearly spelled out in his habilitation plan; the parents had been given a list of physicians from which to choose one for G.W. (they had not responded); the specification of a dental program awaited selection of a dentist from names similarly provided to the parents and/or an evaluation conducted off the grounds of Pennhurst, which the parents would not permit; and 24-hour supervision of G.W. in case of hospitalization had been assured (Cty. Ex. 1). The County did not see fit, as requested by Mrs. C.Y., to change its practice of renting residential property on a year-to-year basis rather than purchasing it outright, because it felt that flexibility was more important than stability in meeting clients' needs; and it was unwilling to agree that G.W. not be involved in any activities in the area specified by his mother, feeling that to do so would unduly restrict both G.W. and those trying to serve him. */ Finally, the County was unable to meet Mrs. C.Y.'s demand for a lifetime guarantee of funding for G.W.'s community program (Cty. Ex. 2).

In the Hearing Master's opinion, the County was as responsive as it reasonably could have been when the parents voiced these concerns; the one overarching objection which could not be satisfied was their opposition to the location of G.W.'s proposed community residence. Nonetheless, at the hearing, R.W. and Mrs. C.Y. continued to raise all these issues -- and some new ones as well. The most substantial are dealt with below.

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*/ For example, the County could not agree that G.W. would not use the services of the hospital closest to his residence.

One area of objection related to the asserted uncertainty of year-to-year funding for G.W.'s community program. While the Commonwealth's attorney, Mr. Slipakoff, stated during one colloquy that the State would not guarantee continued community funding for anyone, the sworn testimony of Dr. Rice -- who is responsible for all mental retardation programs in the Southeastern Region -- was of a decidedly different tenor. According to Dr. Rice, since the Pennsylvania legislature only appropriates funds for a year at a time, no program, in the institutions or in the community, is technically assured for more than one year. But, he said, it is highly unlikely and very unusual for a program already budgeted and in existence (such as G.W.'s) to be denied funding in a subsequent year.

William McKendry, the Chester County MH/MR Administrator, spoke at some length about the Commonwealth's supposedly inadequate funding of community programs, and said he would be the last one to assure that a community program would continue in the same way from year to year; but he also testified that the County had enough money in its budget to operate G.W.'s residential program for this fiscal year, and that if G.W.'s placement were approved, the necessary ancillary services would also be provided, even if doing so might mean denying a service to some other potential client. Despite his unhappiness with the Commonwealth's funding allocations (which might better have been expressed in another forum), in the end Mr. McKendry stood firmly behind his County's proposal for G.W., saying the County would do what it promised and that if G.W. were placed in the

community, the County wanted the placement to work. No CLA in Chester County, he said, has ever been closed because of lack of funds. When Dr. Rice's and Mr. McKendry's statements are taken together on this point, there is no basis in this record, or in law, for assuming that continued funding for G.W. in the community is any less assured than it is at Pennhurst.

Moreover, according to Mr. McKendry, there is no reason for the parents to fear that if G.W.'s proposed placement fails for lack of funds (or any other reason), they will be forced to take over his care. The County might seek to return a displaced client to his parents if no other CLA were available or appropriate, said Mr. McKendry, but it would not insist on the client's return if the parents were unable to care for him. The worst-case alternative in such a situation, said Mr. McKendry, would be placement in a State institution -- that is, the worst thing that could happen to G.W. is that he would go back to where he is now. The Hearing Master finds no justified cause for concern, therefore, in this entire line of objection.

There is a similar lack of support in the record of the parents' concerns about medical and dental care in the community. It is true that Mrs. C.Y. sent unenthusiastic communications (Ex. GW-15) */ to the physicians and hospitals which might serve G.W. in the community, and received some unenthusiastic communications in return (Ex. GW-16). But as Mrs. C.Y. herself conceded,

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*/ No one else has characterized G.W. as "hyper-active" (Ex. GW-15).

no health care provider refused to serve G.W. if selected for that purpose or if the need arose. According to the County, the doctors on the list provided to G.W.'s parents are currently providing services to Pennhurst class members or other retarded persons in the community, and despite local dentists' unhappiness with the reimbursement rate under medical assistance (Medicaid), no community client in the County is going without proper dental care. While the parents were quite critical of the proposed medical services in the community, they were apparently unaware of, or at least not concerned by, a recent incident at Pennhurst in which a nurse could not find G.W.'s vital signs after a cyst was removed from his scalp under sedation (Ex. GW-14). And their assertions that community hospitals could not care for G.W. seemed to be contradicted by the fact that he has been treated in such hospitals several times without incident. */

The parents also emphasized a wide array of inappropriate behaviors which they attributed to G.W. -- self abuse, a lack of interaction with others and with his environment, toileting "accidents," destruction of furniture and clothing, regurgiatation of food, biting other people, resisting attempts to move or motivate, staying awake at night, rejecting the use of a prosthesis (glass eye), and removing his clothes. However, there was little

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*/ Questions were also raised about the fact that medication would be administered to G.W. in the community by a CLA staff member (not a doctor or a nurse) handing it to him and seeing that he swallows it. Dr. Rice testified that this procedure would not violate any law or rule of the Commonwealth; and there was no evidence that G.W. would be thereby endangered.

or no current evidence of many of these behaviors (such as taking his clothes off and destroying things); no attempt had been made to get G.W. to use a prosthesis for several years; and there was ample indication that G.W. responds to people he knows (like Ms. Plasko at Pennhurst or B.G., a former Pennhurst resident now living in G.W.'s proposed CLA) and can communicate some of his feelings and needs. To the extent that they existed, none of these behaviors seemed particularly serious, and in any event, no one explained why they would constitute a reason for not placing G.W. in the community. To the contrary, Mr. Greusel testified that another client's far more frequent incidence of self abuse had been dramatically reduced in G.W.'s proposed community residence; he also suggested that if G.W. were involved in interesting activities (instead of taking naps) during the day, he would be more likely to sleep through the night. Thus the parents' description of G.W.'s difficult behaviors, magnified or not, does not militate against his community placement.

Although a number of other concerns were alluded to in the hearing, */ only one more is worthy of specific discussion here: the parents' concern about community opposition and about G.W.'s possible reaction to what his father called a "hostile world."

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*/ For example, Mrs. C.Y. felt that more attention would be focused on improper conditions at Pennhurst than would be brought to bear upon such conditions in community programs; but Mr. McKendry described an ambitious system of monitoring for County programs which included two visits per month by case management staff and extensive review of all reported incidents. And while the County has no specific emergency or respite care plans for G.W., such facilities are now or can be made available, depending upon the nature of the problem that arises.

In the first place, the parents' speculation about G.W.'s reaction to any aspect of community placement is only that -- speculation -- since G.W. was not given an opportunity to experience life in his proposed residence for any length of time. Moreover, although Mrs. C.Y. spoke to a local zoning official who reacted negatively to community residences for mentally retarded persons,and although R.W. interviewed neighbors who had heard unusual noises coming from G.W.'s proposed CLA or who were for some time unaware of the nature of the residence, there was no substantial evidence of any actual opposition to the CLA in the neighborhood where it is situated. (A rock was thrown through a window of the residence in June, 1980, but on one knows why this was done and there have been no similar occurrences.) The record therefore does not support community opposition as an objection to this particular placement.

What remains, then, as the sole parental objection supported by any degree of evidence in the record is the concern of R.W. and Mrs. C.Y. that they or their other children might be "embarrassed" if they encountered G.W. in the community, particularly if he were engaging at the time in some inappropriate or disruptive behavior. The parents genuinely feel that their other children would suffer if they had to be confronted with such a situation where they go to school or where they socialize with their friends. Behind this feeling, as Mrs. C.Y. stated, is a sense of guilt that the family could not do more for G.W. and that the decision had to be made to place him in Pennhurst; the Hearing Master can readily believe and understand that the family does not want to

re-examine that decision, as they would be forced to do if G.W. once again became, in some degree, a part of their community. This is the real sentiment behind the parents' concern about G.W.'s proposed school district, the location of his community residence, the YMCA where he would go for recreation, the hospital where he would be treated, and even the barber who cuts his hair -- the barber should not be in downtown Paoli, said Mrs. C.Y., "because that's where we live."

This concern is not a mean or selfish one; rather, it is an honest and heartfelt reaction to a difficult and painful situation. I do not condemn the parents for their feelings -- but I cannot uphold them as a basis for keeping G.W. at Pennhurst. While some (but not all) of the other objections to placement voiced by the parents might involve factors that G.W. himself would consider in deciding whether to stay or go, they are not supported by the record; and while the parents' feelings of embarrassment are subtantiated by the evidence (that is, they do exist), I must conclude that they are relevant only to others and not to the person for whom I must make a substituted judgment. I do not believe that G.W., in deciding for himself whether to accept the proposed transfer from Pennhurst to a CLA, would give negative weight to his parents' (and siblings') reluctance to confront him in the community; if anything, I believe he would react positively to the chance to live once again in their society, in a better situation than before. And I believe he would absolve them of their guilt, if they would only absolve themselves.

No relevant contrary indication being supported by the record, I must therefore conclude that the proposed community placement of G.W. is voluntary.

5. Relative Habilitative Benefit

Separate from the question of voluntariness is the inquiry as to whether the living arrangements and services which are being offered to G.W. in the community are more beneficial to his habilitation than those being provided at Pennhurst. A community program may be more beneficial without necessarily being one that a Pennhurst resident would choose, and the converse is also true. Thus the issue of appropriateness must also be addressed.

Since G.W.'s school program will not change, there is no issue as to its continuing benefit. As to the residential aspects of the current and proposed programs, it appears from the evidence that G.W. will have more intensive staff involvement in the community than at Pennhurst (one-to-one as opposed to one or two-seven) as well as a wider range of programs and activities (besides school, his only current Pennhurst program is recreation), and more pleasant and quieter surroundings (he dislikes the sudden, loud noises that are frequently heard at Pennhurst). While certain aspects of G.W.'s community habilitation plan (Cty. Ex. 3) could not be completed because pre-placement activities were halted, even as it stands the County's plan is far more comprehensive and thoughtful than the corresponding document at Pennhurst (Ex. P-4, P-4B). The diligent and sensitive planning by the County, together with the residence provider's apparent success with clients who have similar handicaps, augurs well

for G.W.'s accelerated personal development in the proposed community setting. Therefore, treating the parents' objections (described above) as concerns about the relative habilitative benefits of G.W.'s proposed and current programs, I find that the greater benefit is much more likely to occur in the proposed community placement.

G.W. should not be transferred, however, without the pre-placement visits which many witnesses testified were necessary for a successful transition; my order will provide for such visits before this transfer is finally approved. My order will also allow for the possibility that G.W. may, during these visits, evince reactions to the experience that are contrary to the judgment I have made for him on the basis of current information. The evidence I have heard, though, convinces me rather strongly that G.W. will enjoy this new opportunity -- and that in time his family will also come to accept it.

6. Decision and Order

1. The Hearing Master finds and concludes that the proposed transfer of Pennhurst resident G.W. from Pennhurst to a community living arrangement in Chester County is voluntary in all respects.

2. The Hearing Master finds and concludes that the living arrangements and services which have been made ready for G.W. in the community are more beneficial to his habilitation than those being provided to him at Pennhurst.

3. It is hereby ORDERED that the County MH/MR Administator of Chester County is authorized and directed to proceed with the proposed community placement of Pennhurst resident G.W. as set

forth in the County's notice of placement dated September 9, 1980. The County is further ORDERED to effect such transfer on a gradual basis over a period of not more than 90 days from the date of this order, with final placement to be preceded by pre-placement visits of such number and duration as the County deems necessary and appropriate.

4. This case shall remain open for a period of 90 days from the date of this order, during which time any party to this hearing may notify the Hearing Master, in writing, of any matter or occurrence arising within the specified time period which indicates that the placement of G.W. as herein approved is not voluntary, or that it does not offer greater habilitative benefit to G.W. than his present program at Pennhurst. Such notification shall be served upon all other parties to this proceeding, and shall be made in sufficient detail to enable the Hearing Master to determine whether a further hearing is necessary. No notification, or part of same, will be considered which relates to any matter or occurrence outside the 90-day period specified herein.

5. This decision and order is final as to all matters or occurrences which were raised or could have been raised in the hearing heretofore held in this case. If no notification as described in paragraph 4 above is received within 90 days from the date of this order, this case will be considered closed without the necessity of further action by any party or by the Hearing Master.

7. Procedures for Appeal

Exceptions to the Hearing Master's report may be taken by any participant in the hearing (i.e., the Pennhurst resident, the resident's parent/guardian and/or certified advocate, the Special Master, the Commonwealth, or the appropriate County). Exceptions must be filed, in writing, not later than ten days after the Hearing Master's report is filed with the Clerk of the Court (regardless of the date copies are received) by mailing or delivering such exceptions to:

Clerk of the Court
United States District Court
Room 2609
United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106.

If the tenth day after filing of the Hearing Master's report is a Saturday, Sunday, or Pennsylvania or Federal legal holiday, then the next day which is not a Saturday, Sunday, or legal holiday is the last day on which exceptions may be filed with the Court. For further instructions, see the procedures attached to the Notice of Hearing, at p. 8-10.

DONE this 15th day of October, 1980.

HEARING MASTER

HEARING MASTER
Halderman v. Pennhurst
UNITED STATES DISTRICT COURT

Re: Proposed Community Placement Of P.T.

No. 80-P-4
(Civ. Act. No. 74-1345)

REPORT OF THE HEARING MASTER

1. Procedural History

On or about August 12, 1980, the Hearing Master received from the MH/MR Administrator of Delaware County a notice of a proposed community placement of P.T., a resident of Pennhurst, dated August 6, 1980. Pursuant to the Order of July 14, 1980, the Hearing Master, on August 14, 1980, notified P.T., his parents, Delaware County, the Commonwealth, and the Special Master of a hearing to be held in the Hearing Master's office on September 8, 1980, to determine the voluntariness of the proposed transfer of P.T. from Pennhurst to a community living arrangement in Delaware County. At the request of the parents and because of P.T.'s temporary illness, the hearing was rescheduled for September 16, 1980, and was held on that date and on October 1, 1980.

The hearing was attended by P.T. (first day only) and Penelope Boyd, Esq., the attorney appointed for him by the Hearing Master's order of August 29, 1980; by Mr. and Mrs. F.T. and their attorney, Pamela P. Cohen, Esq.; by the County and its attorney, Patricia Jenkins, Esq.; and by the Office of the Special Master. In addition, although the Commonwealth has declined to participate voluntarily as a party to these proceedings, the Regional Commissioner of Mental Retardation, Dr. Russell Rice,

appeared pursuant to subpoena on September 16, 1980, along with his attorney, Robert Hoffman, Esq. */ Dr. Rice was excused from attending the second day of the hearing.

2. Preliminary Matters

A number of motions were made and ruled upon at the outset of the hearing, and their disposition will be included here as part of the Hearing Master's report. First, the parents moved (with the County's concurrence) to terminate the hearing as being in violation of the partial stay granted on June 30, 1980, by the Unied States Supreme Court in Halderman v. Pennhurst State School and Hospital. This motion was denied on the ground that the Hearing Master, even if he were so inclined, lacks the authority to overrule the District Court's Order of July 14, 1980, which requires hearings to determine the voluntariness of each proposed transfer of a Pennhurst resident to a community living arrangement.

The parents then moved, with the support of the Commonwealth, to dismiss Ms. Boyd as the attorney for P.T. in this matter, on the basis that the Hearing Master has no authority to appoint

*/ Dr. Rice's presence was required by the Hearing Master's standing order of September 15, 1980, as well as by a subpoena served on behalf of Pennhurst resident P.T. The issue which occasioned the Hearing Master's standing order was apparently resolved during the pendency of this matter, although final resolution awaits written confirmation of the Commonwealth's position.

counsel for Pennhurst residents in these proceedings. Whatever may be the import of the reference to retention or provision of attorneys in the Order of April 24, 1980, at 65, and whatever may be the obligation of the Commonwealth thereunder, the Hearing Master believes he has the authority to appoint counsel under Rule 53(c), F.R. Civ. P., which states in relevant part that

> . . . the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order [of reference].

In the instant case, where three other parties to the hearing are represented by counsel, the Hearing Master believes appointment of counsel for the Pennhurst resident is necessary to ensure a balanced presentation of the issues and a proper recognition of the resident's separate legal interest. Thus the motion to dismiss P.T.'s appointed counsel was denied.

By far the most vigorously contested motion made at the hearing was that of the parents seeking to disqualify Ms. Boyd specifically as appointed counsel for P.T., on the basis of (1) Ms. Boyd's alleged unfamilarity with P.T., (2) the purported conflict caused by Ms. Boyd's role as counsel of record for the plaintiffs in Halderman v. Pennhurst, and (3) an alleged conflict arising from Ms. Boyd's asserted relationship with the Pennsylvania Association for Retarded Citizens (one of the plaintiffs in Halderman) and the presence of DelARC, a PARC affiliate, as the proposed community residence provider for P.T. The question of Ms. Boyd's fitness to represent P.T. with respect to the voluntariness and appropriateness of his proposed community

placement, particularly in view of plaintiffs' position in the trial of Halderman to the effect that Pennhurst should be closed, was raised not only at the outset of the hearing but again on the second day (see Ex. P-1, P-2).

The Hearing Master is satisfied with Ms. Boyd's efforts to acquaint herself with the facts of P.T.'s case, and accepts her statement that she has no connection with, and does not represent, PARC or any of its affiliates; thus the first and last objections to her appointment are without merit. As for the conflict between her anti-institutional stance on behalf of the plaintiff class in the main Halderman litigation and her representation of an individual class member in this proceeding, the Hearing Master fails to see any conflict whatsoever. On the surface, it seems entirely proper for an attorney for the plaintiff class in a lawsuit to represent a member of that class in a hearing which arises from and is a part of that litigation. Moreover, to the extent that Ms. Boyd's personal views or legal arguments may have deviated in the past or may deviate in the future from the prevailing law of this case, Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979), she has agreed on the record that she is presently bound by the Third Circuit's decision. The Hearing Master's instructions to Ms. Boyd were to advocate for P.T.'s wishes insofar as they can be determined, and otherwise to be guided by the presumption in this case in favor of placing mentally retarded persons in the community (see Halderman v. Pennhurst, supra; Order of April 24, 1980, at 66); there has been no indication that these instructions have not been

followed. For these reasons, as well as those set forth in my order of August 29, 1980, the motion to disqualify Ms. Boyd was denied.

A related motion was Ms. Cohen's request that she be compensated at the same rate ($60 per hour) as established in my order of August 29, 1980, for counsel appointed to represent Pennhurst resident P.T. This motion was denied because the Hearing Master appoints (and compensates) counsel for Pennhurst residents -- who are generally unable, financially and otherwise, to retain their own -- only in those situations where other parties can and do secure legal representation; it would make no sense for the Hearing Master also to compensate the lawyers whose presence makes it necessary to appoint counsel in the first place. The Hearing Master will not discourage parents and governmental units from seeking legal representation, but I see no obligation to provide and pay for such assistance for anyone but the Pennhurst resident.

The parents also asked the Hearing Master to recuse himself on the basis of certain pro-community statements he allegedly made at a meeting at Bryn Mawr College in June, 1980. (Mr. Hoffman took no formal position on this motion on behalf of the Commonwealth, but professed surprise at the Hearing Master's alledged remarks.) I cannot now recall what I said at the Byrn Mawr conference, and can only say that my personal philosophy is entirely consistent with the Third Circuit's decision in this case -- and that if it were not, I could and would disregard it. The question in this hearing, in any event,

is not "the community" versus "the institution," but the voluntariness and appropriateness of particular living arrangements and services for a particular individual. I perceive no difficulty in deciding these issues solely on the basis of the evidence and arguments presented to me; accordingly, the motion has been denied.

The parents next moved that the Hearing Master define the concept of "voluntariness" at the outset of the hearing, so that the parties would know what evidence to present and where the burden of proof would lie. While referring to previous decisions in which some aspects of "voluntary" transfers were discussed, the Hearing Master declined to decide the issues which might arise in the instant matter before hearing the evidence and the arguments of counsel, if any.

Finally, Ms. Boyd moved on P.T.'s behalf to limit the hearing in this matter to the question of whether P.T. should be exposed to the pre-placement visits to the proposed community residence which normally precede the actual transfer to the community -- and indeed, which normally precede the hearings on voluntariness and appropriateness. In the ensuing discussion, it developed that P.T. had not been on any visits to the proposed residence, that his parents were not now willing to agree to such visits, and that they had certain concerns (physical safety, child abuse, and inadequate planning) that would have to be addressed before such visits could be considered. Mr. Hoffman then moved that the parties be required to mediate their disagreements with the Commonwealth's assistance, pursuant to

the Order of April 24, 1980, at 64. No such mediation had been attempted, but since the parents initially declined to submit to this process, the Commonwealth's motion was denied (see infra). As to Ms. Boyd's motion, the Hearing Master was of the opinion that hearings were to be held on the voluntariness and appropriateness of proposed community placements, rather than on parents' objections to pre-placement visits; therefore, the motion to confine the hearing to the latter issue was denied.

As the hearing went on, however, it became increasingly clear that the lack of pre-placement visits was operating to deprive the parties and the Hearing Master of possibly valuable information as to the suitability of P.T.'s proposed community program and P.T.'s reaction and adjustment to the residence in question. While there was a serious dispute, which the Hearing Master will not attempt to resolve, as to when, how, and whether mediation was offered to and/or rejected by Mr. and Mrs. F.T. -- and the relation of these events or non-events to the possibility of pre-placement visits -- two points became quite clear to the Hearing Master: first, the Commonwealth had not intervened directly with an offer of mediation but rather had caused the offer to be communicated to the parents by the County in a cryptic and ineffective manner (Cty. Ex. 2), and second, despite the parents' prior letter to the County expressing opposition to any community placement (Cty. Ex. 3), they were voicing specific concerns at the hearing which seemed eminently susceptible to mediation. At the end of the first day of hearing, after repeated urgings by the Hearing Master and Mr. Hoffman, Mr. and Mrs. F.T. agreed to attempt to resolve their concerns through

the Commonwealth's mediation process, and the hearing was recessed for that purpose.

The only problem with this rather positive development was that there was no mediation process in existence. Despite the plain requirement of the Order of April 24, 1980, at 64, that the Deputy Secretary for Mental Retardation or her designee attempt to resolve disagreements over proposed community placements, and despite the Hearing Master's (and Mr. Hoffman's) understanding that a mechanism for same was available, Ms. Cohen reported to the Hearing Master on or about September 25, 1980, and the Hearing Master subsequently confirmed, that no official of the Commonwealth was prepared to mediate the problems in this case. Upon resumption of the hearing, Ms. Cohen stated, without contradiction, that Mr. and Mrs. F.T. had not been contacted by any Commonwealth representative. Moreover, said Ms. Cohen, when she contacted Pennhurst superintendent Geroge Kopchick, the Commonwealth's designated mediator (Cty. Ex. 2), he told her that while he might attempt to resolve a minor disagreement, he would not intervene in a situation, such as the instant matter, where the parents were raising substantial objections. And so the hearing continued to its inevitably unpleasant conclusion.

The Hearing Master is at a loss to understand the Commonwealth's indifference toward parents like Mr. and Mrs. F.T. who are honestly troubled by questions regarding the community programs being proposed for their children -- and toward the residents of Pennhurst whose lives and futures depend on the resolution of those questions. I am convinced that the absence

of the mandated mediation procedures in this case necessitated, as much as any other factor, the unfortunate and unsatisfactory decision I have been compelled to render.

3. Background

P.T. is an 18-year-old resident of Pennhurst who is severely or profoundly mentally retarded, with significant physical deficits (poor balance, weak muscular functioning, and fairly frequent seizures) but with no severe behavior problems. He is ambulatory (though he often loses his balance), essentially nonverbal, and is need of assistance with most of his self-help skills such as eating, toileting, and dressing. Very small for his age, P.T. is an appealing young man who seems interested in his environment and quite affectionate towards people he knows. He likes to walk and explore things, but has no sense of danger and has a habit of putting foreign objects in his mouth. All in all, though he is severely handicapped and requires close supervision, there is nothing about P.T. that makes him an especially difficult or inappropriate candidate for community placement. In particular, a neurological evaluation by the County's core team specialist established that P.T. had no neurological problem (e.g., seizures) which would be exacerbated by movement into the community.

The County has now prepared an individual habilitation plan for P.T. (Cty. Ex. 1), and on the basis of that plan (developed with the involvement of his parents), it proposes to transfer him from Pennhurst, where he has lived for 4 1/2 years, to a community living arrangement in Lansdowne, Pennsylvania.

The proposed residence for P.T., to be operated by DelARC, is designed to accommodate five (possibly six) mentally retarded persons; P.T. would be on the first floor with two other clients, accompanied by two staff workers during waking hours. The night-time staffing initially assigned to the residence (one person awake on the premises from 11 p.m. to 7 a.m. to care for all five or six clients) was concededly inadequate, but steps have been taken to add another person to this shift. A nurse would be available to administer P.T.'s seizure and other medication in the residence.

P.T. has been evaluated and determined to be in need of speech therapy, physical therapy, and occupational therapy, and would receive these services in the community under the auspices of the County core team. Within one month of placement, he would receive further behavioral, orthopedic, hearing, dental, and dietary evaluations, and any services determined to be necessary would be incorporated into a revised habilitation plan within 60 days of placement.

During the day, P.T. would attend the Summit School, a component of the Delaware County public school unit for handicapped children, which is essentially similar to P.T.'s current education program (at the Liberty Forge unit in Chester County) in terms of distance from his residence, staffing, and program. The Summit School would follow P.T.'s individual education plan from Liberty Forge for 30 days, after which it would develop a new IEP with the involvement of parents and others. A major focus of P.T.'s community program, in school and in the residence,

would be the development of daily living skills, particularly toilet training.

The community residential and day program for P.T. resulted from an extensive planning process and is reflected in a transitional individual habilitation plan finally developed at a meeting on June 5, 1980, which was attended by P.T.'s parents, prospective community providers, P.T.'s County case manager, and others (Cty. Ex. 1). The plan has been approved by the Office of the Special Master as offering services which will be more beneficial to P.T.'s habilitation than those provided to him at Pennhurst, to the extent that such benefits can be determined without pre-placement visits by the client to the proposed residence. P.T.'s parents continue to object to the proposed placement.

4. Voluntariness of Transfer

Under the Court's Order of July 14, 1980, implementing the Order of the United States Supreme Court dated June 30, 1980, no resident of Pennhurst may be transferred to a community living arrangement unless and untill the Hearing Master determines that the transfer in question is "voluntary."

The above mentioned orders provide the Hearing Master with no guidance as to what constitutes a "voluntary" transfer; thus the term must be interpreted and applied on a case-by-case basis. The case of P.T. involves the application of this concept where the Pennhurst resident in question has had his eighteenth birth-

day and is thus no longer a minor,*/ has no legal guardian, is unable to communicate his preference in the context of a hearing, and has not been afforded the opportunity to manifest his feelings in some other manner through exposure to the proposed community setting. Determining voluntariness in such a case is obviously not a simple exercise.

First, it should be clear that voluntariness is a consideration here solely because of the District Court's order interpreting the Supreme Court's partial stay. Under Pennsylvania law, see 50 P.S. §§4402, 4403, 4420 and implementing regulations, 3 Pa. Bull. 1840 (1973), 6 Pa. Bull. 2884 (1976), Commonwealth officials can generally discharge or refuse to admit persons whom they determine not to be in need of institutionalization, regardless of the wishes of the client or other applicant for admission. And it was clearly the case under the Order of April 24, 1980, at 63-67, that a mentally retarded person could be transferred from Pennhurst to a community living arrangement over anyone's objection, including his own, if it was determined that the CLA was more beneficial to that person's habilitation. Thus in determining voluntariness in cases such as that

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*/ It is true that Pennsylvania's "voluntary" admission/commitment statute, 50 P.S. §§4402, 4403, upheld by the United States Supreme Court in Secretary v. Institutionalized Juveniles, ___ U.S. ___, 99 S.Ct. 2523 (1979), allows parents to initiate institutionalization of children "18 years of age or younger," but this statutory aberration does not change the generally accepted age of majority. Even if P.T. were considered a "mature minor" rather than an adult, the analysis in this report would be the same.

of P.T., the Hearing Master is essentially writing on a clean slate and not diminishing (or enhancing) a right that has an independent existence outside the immediate context.

Next, the Hearing Master has had occasion in prior cases to construe the Order of July 14, 1980, to this extent: at least in the cases of adult Pennhurst residents, proposed transfers to community living arrangements should be presumed to be voluntary in the absence of any indication to the contrary. The Hearing Master hereby reaffirms that interpretation in this case, the first in which the voluntariness question has been genuinely contested. This preumption ought to be applied, in my opinion, because of the general legal principle favoring lesser over greater degrees of restriction on personal liberty, e.g., Shelton v. Tucker, 346 U.S. 479, 488 (1960); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975), and, more particularly, because of the legal presumption in all aspects of Halderman v. Pennhurst, which the Hearing Master must observe, in favor of placing mentally retarded persons in the community. Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979); Order of April 24, 1980, at 66. In light of the foregoing general legal principle and its specific application to this case, when it is necessary to make some assumption regarding the resident's choice, the Hearing Master must presume, in the absenceof any contrary indication on the record, that the resident would choose lesser rather than greater restriction and a program which is more likely to be beneficial to his habilitation rather than one which is less likely to be beneficial.

But in this case,of course, there are some contrary indications in the record, emanating from P.T.'s parents; so the questions becomes one of whether, how, and under what standard the parents' objections should be evaluated. Especially since P.T. is an adult and since his parents are not his legal guardians, I do not believe that the objections of his parents, whatever their basis or their merits, must be treated as conclusive, making the proposed transfer involuntary. As set forth more fully below, I do not think that total deference to the parents comports with what courts have done in similar situations or with the intention of the District Court in the instant case.

It might be argued that the Supreme Court's ruling in Secretary v. Institutionalized Juveniles, supra -- which vests parents of retarded persons 18 and younger with substantial discretion over their children's admission to mental institutions -- requires the Hearing Master in this case simply to ascertain the parents' wishes and then comply with them. But in my opinion, even though the word "voluntary" is used in both instances, the question in this hearing is of a different character than that in proposed admissions or commitments; the voluntariness question here is what is the desired or preferred course of action, i.e., what does someone want -- rather than what is clinically necessary or appropriate, i.e., what should be done to or with somebody. And in any event, the statutory parental discretion approved in Institutionalized Juveniles was far from absolute; as the Supreme Court noted, the law satisfied due process requirements in part because facility directors retained the authority to deny ad-

mission (in the face of parental application and medical or psychological concurrence) if they determined that institutionalization was not required. Id. at 99 S.Ct. 2527-2528. Here, the professional determination has been made that P.T. does not need to remain at Pennhurst and, indeed, that he can benefit from community placement; thus, were it not for the Order of July 14, 1980, the holding in Institutionalized Juveniles would, if anything, require his release.

Nonetheless, I do not believe it would be proper for me to disregard entirely the objections of P.T.'s parents. Under the District Court's Orders of April 24, 1980, and July 14, 1980, parents of Pennhurst residents are clearly intended to participate in the planning and evaluation of proposed community placements, regardless of the age of the clients. In addition, I am convinced that concerned parents of Pennhurst residents of all ages were intended to have, and should have, a role in determining whether proposed community placements are voluntary. What that role should be in this case obviously depends on the standard for determining voluntariness.

After extensive research and consideration, the Hearing Master has determined that what he must do in this case is to make a substituted judgment as to what P.T. would choose if he were competent to do so -- to "decide what [he] would choose, if he were in a position to make a sound judgment." In re Weberlist, 360 N.Y.S. 2d 783 (Sup. Ct. N.Y. 1974). This approach has been utilized by the courts since 1816, when an English court disposed of an incompetent person's estate by substituting itself as nearly as possible for that person and basing its decision on

the same factors and considerations that would have been relevant to the incompetent. Ex parte Whitbread, 35 Eng. Rep. 878 (1816). It has also been used by some courts to authorize the donation of kidneys by minors or legally incompetent adults to family members suffering from renal disease. Strunk v. Strunk, 445 S.W. 2d 145 (Ky. Ct. App. 1969); Howard v. Fulton-DeKalb Hospital Authority, 42 U.S.L.W. 2322 (Ga. Sup. Ct., November 29, 1973); but see In re Richardson, 284 So. 2d 185 (La. App. 1973), cert. den. 284 So. 2d 338 (La. 1973); In re Pescinski, 226 N.W. 2d 180 (Wis. 1975).

I believe this approach is preferable to allowing P.T.'s parents an absolute veto, or to imposing my own beliefs upon P.T., because it gives meaning to the concept of voluntariness while still according to P.T. (and others) "the fullest possible expression to [their] character and circumstances." Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417, ___ (Mass. 1977). As the court said in Saikewicz about a legally incompetent retarded person being offered life-saving medical treatment, it is not enough to determine the "best interests" of a voiceless individual or to make decisions for that individual on the basis of what a so-called "reasonable man" might do:

> The "best interests of an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons. It does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others . . . . [T]he State must recognize the dignity and worth of such a

> person and afford to that person the same panoply of rights and choices it recognizes in competent persons. . . . To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.

Id. at 428.

In attempting to determine whether P.T. would choose to remain at Pennhurst or move into the community, it is appropriate to give weight to his parents' objections even though they are not binding. Certainly, the parents of a Pennhurst resident may be well situated to assist the Hearing Master in determining what decision their child would reach. But all parental objections are not entitled to the same weight; I will determine what weight to give them on the basis of (1) the degree of the parents' involvement with the Pennhurst resident, and their familarity with his present and proposed living arrangement and services; (2) the presence in the hearing record of at least some evidence substantiating the parents' concerns; and (3) the extent to which the parents' objections are based upon factors or issues which the resident himself would consider if he were able. Of course, I will also consider any actual manifestation of the Pennhurst resident's reactions or desires, as well as other relevant information from whatever source, in making my substituted judgment on the resident's behalf.

In this case, since there were no pre-placement visits, there is no direct information as to P.T.'s reaction to community living. Thus the Hearing Master must rely primarily upon the

parents' testimony, and evaluate it under the above standard to determine what light it sheds on how P.T. would make the decision himself.

To begin with, there is no question that P.T.'s mother and father are closely involved with him and genuinely concerned about his welfare. They have visited him once or twice a month during his 4 1/2 years at Pennhurst, and have taken him home every holiday for up to five days at a time; moreover, their concern and affection for their son were obvious during the hearing. Mr. and Mrs. F.T. participated in the planning for P.T.'s community placement for approximately a year, attended several meetings in this regard, visited both the proposed residence and the Summit School, and discussed P.T.'s proposed program extensively with staff of the County and the provider agencies. They have also attended annual program reviews at Pennhurst. Thus the parents speak with considerable knowledge about the services being offered to P.T. in the community and those being provided at Pennhurst.

As noted above, Mr. and Mrs. F.T.'s objections focused on the areas of safety, child abuse, and inadequate community planning. Almost without exception, the concerns they raised were matters that P.T. would consider in making his own decision -- obviously, a person being moved to a new home and school setting would want to know if he were in danger of being physically injured, either by accident or by deliberate abuse. And while some of the parents' concerns were not substantiated by any credible evidence, most of what they said seemed to have at least some basis in fact.

Perhaps most significant in this regard, in terms of the record made at the hearing, were the County's uneuthusiastic presentation of its proposed program for P.T., the Commonwealth's disinclination to offer the parents any support or encouragement, and the grudging, incomplete, and unsatisfactory answers provided by the County and the prospective residential provider to the parents' legitimate questions. I cannot blame the parents for asking these questions, and for not being satisfied with the replies. Further, I cannot say that P.T., if he had asked the same questions and been given the same answers, would be any more comfortable than his parents are with the proposed community placement. I am not going to shove this proposed placement down the throats of not only P.T. and his parents, but of the County and the Commonwealth as well.

Some of the possible problems identified by the parents, for example, related to physical aspects of the proposed residence: a four-foot grade or drop from the sides of the house to the street, unenclosed cement steps leading to the cellar, an "L" shaped driveway obscuring the vision of persons driving up to the residence, lack of a fence to keep P.T. and others from straying on to a nearby highway, a bathtub the parents felt was unsafe for P.T., and no door between the kitchen and the rest of the residence. The parents were concerned about these features of the residence because of P.T.'s unsteady gait and his unawareness of dangerous situations.

The County, through Ms. Jenkins and Steven Chafetz, its Pennhurst liaison, indicated a willingness to have the residence fenced in, and agreed to install a door to the kitchen (which

had already been ordered in the case of S.P., No. 80-P-10). As for the other problems, the County said, in effect, that there is always a risk to clients like P.T., and that the danger would remain even if all the requested changes were made. Ms. Jenkins said the County would not object if the residence provider, DelARC, decided to make the adjustments on its own and with its own funds; otherwise, the County's role would be limited to transmitting the provider's request for funds to the Commonwealth for approval. Wayne Dudiak of DelARC, called to testify on behalf of P.T., was unable to commit his agency to any particular alterations. All in all, while some of the dangers cited by the parents may have been illusory (the bathtub, as described, did not seem terribly hazardous), */ the response of the County and the provider was anything but reassuring.

Similarly, although the Hearing Master was not much taken with Mr. and Mrs. F.T.'s complaints about the arrangements for P.T.'s medical care in the community, he could well believe that the parents (and P.T., if he understood) would be worried by Mr. Dudiak's "understanding" that seizure management had been "touched on" but not "expanded upon" in the training of residence staff. In the same vein, Mr. F.T. testified that he had seen a staff member of the Summit School physically abuse a child during his and Mrs. T.'s visit to the school; this observation may or may

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*/ The parents also complained bitterly that P.T.'s habilitation plan (Cty. Ex. 1) called for him to be taken swimming in disregard of his fear of the water, when in fact the plan indicated full and due regard for this problem.

not have been significant in terms of what would happen to P.T., but the parents' concerns were no doubt intensified, as P.T.'s would have been, by the County's response that it could not guarantee an investigation if a complaint of abuse were made against the school. This was, at best, a bureaucratic rather than humane response.

Finally, in response to a question by the parents' attorney regarding the relative benefit of the community as compared to Pennhurst, Mr. Chafetz replied that he could not answer because he did not know of "any place in the country where children of this functioning level have been placed in this kind of setting." The Hearing Master does not believe this statement is factually accurate, even as it applies to the State of Pennsylvania, but in any event it could only have confirmed Mr. and Mrs. F.T.'s doubts (and P.T.'s, if the decision were his) about the widsom of the proposed movement.

As for the Commonwealth, its refusal to participate meaningfully in these hearings (on the basis of Deputy Secretary Howse's letter to me of September 5, 1980) allowed statements such as Mr. Chafetz' to go unrebutted, and robbed the parents of any feeling that there was a firm public policy and commitment in support of successful community programming for their son and others like him. And as noted above, the Commonwealth's failure to provide mediation in this case forfeited a genunine opportunity to address the parents' legitimate concerns in a proper setting and to eliminate, before any hearing on voluntariness, the factors which might well cause someone in P.T.'s position

to choose to remain at Pennhurst.

The Hearing Master believes that there are many attractive features in the proposed community program for P.T. Also, I am unsure, on the basis of some of the parents' remarks, whether they would agree to P.T.'s transfer even if all their concerns were addressed. But the actions and inaction of the County, the Commonwealth, and (to a lesser extent) the residence provider have left the record in this case in such a state that I cannot conclude, because of the legitimate problems identified by his concerned and knowledgeable parents, that P.T., if he were able, would consent to the proposed movement. Therefore, with great regret for the opportunity which has been lost in this case through official indifference and (I suspect) legal posturing, I must order termination of the present plans to transfer P.T. from Pennhurst to a CLA.

5. Relative Habilitative Benefit

In view of my decision on the voluntariness issue, it is unnecessary for me to decide whether the living arrangements and services which have been made ready for P.T. in the community are more beneficial for his habilitation than those being provided at Pennhurst. But I will observe that I was not persuaded, by the uninspired and self-serving description presented at the hearing, that Pennhurst is adequately meeting P.T.'s needs; and I was very disturbed to learn that P.T. is being moved tomorrow from a "modular" unit, which offers some home-like amenities as well as immediate access to the environment, to an older, less appropriate building (Wilson) which lacks these positive features.

For this latter reason, inter alia, I will include in my order a provision which will allow P.T.'s parents to reconsider what they (and he) desire in light of this change in circumstances.

6. Decision and Order

1. The Hearing Master finds and concludes that the proposed transfer of P.T. from Pennhurst to a community living arrangement in Delaware County is not voluntary.

2. The County is ORDERED to terminate the present arrangements for transferring Pennhurst resident P.T. to the community pending further ruling by the United States Supreme Court.

3. The County is further ORDERED to reserve a vacancy in the community living arrangement proposed for P.T. for a period of 90 days, during which time it shall work with P.T. and his parents to resolve their concerns about the proposed community placement. Mr. and Mrs. F.T. are expected to cooperate with the County in this effort.

4. If, during the 90-day period referred to in paragraph 3 above, the County determines that mediation is necessary with regard to disagreements over P.T.'s proposed community placement, the County shall request the Commonwealth to provide such mediation, and the Commonwealth shall do so within seven days of such request.

5. If the measures required by paragraphs 3 and 4 above are successful in resolving the concerns of P.T. and his parents about the proposed community placement within the specified 90-day period, the County shall issue a new notice of proposed community placement. Upon receipt of a copy of same, the Hearing Master will schedule another hearing to determine the

voluntariness and, if necessary, the appropriateness of P.T.'s proposed transfer from Pennhurst to a community living arrangement.

7. Procedures for Appeal

Exceptions to the Hearing Master's report may be taken by any participant in the hearing (i.e., the Pennhurst resident, the resident's parent/guardian and/or certified advocate, the Special Master, the Commonwealth, or the appropriate County). Exceptions must be filed, in writing, not later than ten days after the Hearing Master's report is filed with the Clerk of the Court (regardless of the date copies are received) by mailing or delivering such exceptions to:

Clerk of the Court
United States District Court
Room 2609
United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106.

If the tenth day after filing of the Hearing Master's report is a Saturday, Sunday, or Pennsylvania or Federal legal holiday, then the next day which is not a Saturday, Sunday, or legal holiday is the last day on which exceptions may be filed with the Court. For further instructions, see the procedures attached to the Notice of Hearing, at p. 8-10.

DONE this 8th day of October, 1980.

HEARING MASTER

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SUPREME COURT, U.S.

No. 80-738

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

IN RE: PENNHURST PARENTS-STAFF ASSOCIATION,
Petitioner and Movant

On Petition for Writ of Mandamus and Prohibition
to the United States District Court
for the Eastern District of Pennsylvania

RESPONSE OF TERRI LEE HALDERMAN, et al., TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

David Ferleger*
Penelope A. Boyd

37 South 20th Street
Suite 601
Philadelphia, Pa. 19103
215-567-2828

*Attorney of Record

QUESTIONS PRESENTED

On June 30, 1980, the Court denied a six-pronged request for stays of various prior and future orders of the District Court in a case involving the statutory right of retarded people to be free of institutional abuse and to receive adequate programs in an appropriate setting. A stay was "granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.' In all other respects, the motion is denied." On July 14, 1980, the District Court responded to the stay and ordered that "no resident of Pennhurst shall be transferred to a community living arrangement" unless it is determined that the transfer is voluntary. After hearing, in a July 29, 1980 Opinion, the District Court held that it had a duty to "ensure that residents and their families make informed judgments" and to ensure, as to voluntary transfers, "adequate provision for the safety and habilitation of the retarded residents."

1. Is mandamus an appropriate remedy to override the District Court's July 14, 1980 Order where a) the petitioner has no standing to seek mandamus, b) the petitioner waited four months since the order to seek mandamus, c) the District Court reasonably exercised its obligation to interpret this Court's Order, d) other remedies, including an appeal to the Court of Appeals and hearings before the District Court, are already in process on the issue sought to be raised, and e) the petitioner did not appeal or seek a stay of the District Court order?

2. Is alteration of the June 30, 1980 Order appropriate where petitioner waited four months to seek any relief, where alternative mechanisms to resolve particular disputes are in place and in use in the District Court, where further stay would amount to a decision on the merits, where the status quo is such that plaintiffs below would be irreparably harmed by any further stay and petitioner has failed to even allege irreparable harm?

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No. 80-738

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

IN RE: PENNHURST PARENTS-STAFF ASSOCIATION,

Petitioner and Movant

On Petition for Writ of Mandamus and Prohibition to the United States District Court for the Eastern District of Pennsylvania

RESPONSE OF TERRI LEE HALDERMAN, et al.,
TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Respondents Terri Lee Halderman, et al., respectfully urge the Court to deny the Petition for Mandamus and Prohibition, and for expansion of stay, filed by one of the petitioners in the cases soon to be argued, Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489.[1]

The belated petition -- filed four months after the challenged order by a party which did not appeal or seek a stay of the order -- is submitted by a group with no standing to seek mandamus and with no grounds upon which the extraordinary writ may be granted. The question sought to be raised is at this time pending both in the Court of Appeals and in proceedings scheduled in the District Court. No grounds exist for modification of the existing stay.

STATEMENT OF THE CASE

I. The Court Orders

More than five months after the decision of the Court of Appeals for the Third Circuit under review here on the merits, Petitioner Pennhurst Parents-Staff Association filed a Motion for Stay in this Court requesting a stay of six separate categories of

1. Petitioner's application is typewritten and their request for leave to file a typewritten pleading is pending. Should their request be granted, respondents similarly request leave to file this response. Should petitioner's request be denied, respondents will file a printed response.

existing and future orders of the District Court:

> 1. A stay of paragraphs 1-11 of the order of March 17, 1978, as amended, in their entirety.
>
> 2. A stay of paragraphs 12-20 of that order insofar as those paragraphs require or depend upon the Special Master and other personnel and procedures established by that order.
>
> 3. A stay of the order of March 5, 1979, as amended, insofar as it requires or depends upon the Special Master and other personnel and procedures established by the district court's order.
>
> 4. A stay of the order of June 8, 1979, as amended, in its entirety.
>
> 5. A stay of Section V of the April 24, 1980 order in its entirety.
>
> 6. A stay of all future orders of the district court insofar as they relate to the transfer of people from Pennhurst and/or to the utilization of the Special Master, including but not limited to the district court's proposed order of May 20, 1980.

Had it been granted, the stay would have immobilized the district court and its master and would have condemned every one of the approximately 1000 people at Pennhurst, no matter what their desire and regardless of the actual availability of alternatives, to continued incarceration in an institution so bankrupt that its continued existence is not suggested by any party in this litigation.

Respondents opposed the stay motion on both legal and factual grounds including the following:

-- the irreparable harm to plaintiffs confined under conditions found "abominable" by every member of the Court of Appeals en banc;

-- the existence of a status quo under which planning for appropriate services had been ongoing for two years and three months;

-- the existence of procedures for individual class members to challenge any proposed placement outside the institution;

-- the failure of petitioner to seek the requested relief below;

-- the petitioner's delay in seeking a stay.

On June 30, 1980, the Court entered the following order denying every aspect of the six requested stays but one:

> Petitioner's motion for a stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is denied.

Responding to this Order, the District Court on July 14, 1980 ordered that "no resident of Pennhurst shall be transferred to a community living arrangement in accordance with prior Orders of this Court unless and until the Hearing Master has determined that such transfer is necessary." The court also set a hearing for July 21, 1980 to receive memoranda and argument form the parties on any further orders that might be required in light of the Supreme Court's order of June 30.

On July 29, 1980, the District Court filed a five page opinion finding:

> There is absolutely no support for the Parents-Staff Association's position that the Supreme Court intended to close the doors of Pennhurst, forbidding anyone to leave. As to the position of the Commonwealth and Counties that voluntary transfers may proceed, but that this Court has no authority in connection with such transfers, we must look to the motion for stay and the precise wording of the Supreme Court's Order. The motions sought a stay of paragraphs 1 through 11 of the Order of March 24, 1978 [correct date: March 17, 1978], as amended, which set forth specific procedures for planning, development and monitoring of community living arrangements. A stay of the Order of June 8, 1979, which provided specific steps for transferring the school-age residents of Pennhurst to the community, was also sought. Further, the Parents-Staff Association sought to stay Part V of the Order of April 24, 1980, which provided for individual determinations as to the appropriate habilitation for Pennhurst residents, as mandated by the Court of Appeals for the Third Circuit. If the Supreme Court had intended to terminate the involvement of this Court in the voluntary movement of Pennhurst residents to the community, it could easily have done so by specifically granting the three

stay requests.

Slip Opinion of July 29, 1980 at 3-4. Judge Broderick understood the June 30 Order to mean what it said:

> We understand the word "mandate" to have its literal meaning -- that this Court cannot mandate the movement of residents from Pennhurst to the community. Nothing in the Supreme Court stay order suggests, however, that voluntary transfers may not proceed, nor that this Court may not ensure that residents and their families make informed judgments as to such voluntary placements.

Id. at 4(emphasis supplied). Finally, the District Court recognized its duty to approve movement of class members once their safety and care were ensured:

> Furthermore, we find nothing in the Supreme Court stay order to prevent this Court, with the assistance of its Special Master and Hearing Master, from ensuring that such voluntary transfers make adequate provision for the safety and habilitation of the retarded residents.

Id. at 4-5.

There is a context to these actions of the District Court not mentioned in the mandamus petition. On July 15, 1980, the court received a report from experts retained by the Special Master (and selected with the concurrence of the Commonwealth) as a result of a contempt motion filed by plaintiffs Halderman, et al., regarding the deaths of 50 Pennhurst residents since the March 17, 1978 Order. That report, finding that residents were dying preventable deaths and that medical care at Pennhurst is shockingly inadequate, prompted the District Court to order the Commonwealth defendants to show cause why they should not be held in contempt of court. The report on deaths is attached hereto as Exhibit A and the July 22, 1980 Order to Show Cause is attached as Exhibit B.[2]

II. The State and County-operated process for community placement is unhindered; successful movement is occurring.

No person has left Pennhurst or is leaving Pennhurst without the approval and support of the Commonwealth and County for

---

2. At the August 4, 1980 hearing on contempt, the Commonwealth agreed to adopt the report's recommendations and the hearing was recessed to permit the parties to attempt to negotiate remedies. The negotiations broke down and the matter is again before the Court.

a particular proposed placement. These defendants themselves, not the Court or its master, must formulate a habilitation plan and provide services. Order of March 17, 1978. para. 1 and 2.

For every Pennhurst resident whose placement the Hearing Master has reviewed, the Commonwealth approves the proposed site and ensures staff training. Order of June 8, 1979, para. 11. The County provides those services it has itself planned for. Id. at para. 7 and 14.

No current resident in the placement process can move to an individualized program unless the Commonwealth provides a formal assurance statement:

> Assurance statement says that the proposed CLA and other community services will be more beneficial to the resident than the services and living arrangements at Pennhurst Center.

Guidelines for Case Managers 9 n. 1 (Office of the Special Master, August, 1980).

There is no obstacle to the state and county defendants continuing the community placement process they claim to support. The court below, as the Court here, has carefully limited its role to oversight of the process, a process which has resulted in great benefit to Pennhurst residents. Since March 17, 1978:

1. 85.9% of people leaving Pennhurst are in community programs. Table I Report to the Court: The Individuals Who Moved From Pennhurst 3 (Office of the Special Master, October 1, 1980)("Report"). The table is attached as Exhibit C; the full report has been lodged with the Clerk of the Court.

2. Most people who have been relocated to the community have no difficulty in hearing (86.9%), seeing (72.1%) or walking (68.9%). Tables VII and VIII, Report, attached as Exhibits D and E.

3. Vists by family to former Pennhurst residents have increased 300% since their move; trips with family members have increased 1,200%. Table X, Report, attached

as Exhibit F.

4. Participation of family in program planning for community care is present for 61.5% of residents (an additional 13% have no family). While at Pennhurst, family's participation for these residents was at the 12.3% level. Table XI, Report, attached as Exhibit G.

5. Programs and medical care previously unavailable at Pennhurst are now being provided to plaintiffs whose improvement in many cases has been dramatic. Report at 24-33.

As the attached affidavits show, Exhibits H through N , no "bureaucracy" exists to interfere with informal and successful placement efforts and, of greater importance, parents and residents alike anxiously await the day when they will be freed of concern with the lack of care at Pennhurst. For example,

Petitioner's objections to the Hearing Master process (which the Court was asked to stay in June but for which a stay was denied) appear to center on one particular hearing, that for G.W., No. 80-P-16, as to whom a motion for stay and exceptions are pending in the District Court, which is scheduling a hearing for the near future. The silence of petitioner regarding the other hearings is understandable because the actual process, summarized in the Chart on the next page, demonstrates that:

1. Of the 21 hearings on movement from Pennhurst, 19 have involved parental approval of a proposed placement.

2. Of the 21 hearings, all 21 involved County and Commonwealth approval of the proposed placement at or before the hearing.

3. Of those hearings, in many cases -- 6 in all -- it was found that what was proposed by the state and county was not adequate to meet the needs of the resident or the concerns of parents and adjustments were necessary.

4. In the two cases where parents did not approve of the placement (one involving an adult, G.W., and the other a minor, P.T.), the parents and the counties filed exceptions and those exceptions are to be heard by the District Court.

There has thus been no order of the District Court mandating the movement of any resident from Pennhurst. The only movement has been voluntary.

Nor has every case even required an informal hearing. In several cases, noted in the Chart, parents have expressed their approval of a placement by telephone and, no party objecting, the voluntary placement has gone forward. In every case but those in which exceptions are pending, there has been no dispute and no attorneys.[3]

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3. For G.C. who is George Sorotos Caranfa, an original plaintiff, his attorney David Ferleger appeared to witness the confirmation of what Mr. Caranfa and his family sought when suit was filed in 1974. See affidavit attached as Exhibit L . In two other cases, the county, but no other party, had an attorney.

SUMMARY OF PROCEEDINGS OF HEARING MASTER

REGARDING COMMUNITY PLACEMENTS OF PENNHURST RESIDENTS

Number	Client Initials	Age of Client*	Parent Approval of Transfer	Hearing Date**	Services in Place	Parties Represented by Attorneys	Hearing Master's Action	Exceptions to program filed
80-P-1	C.K.	20	yes	8/15 (phone)	yes	none	approved	no
80-P-2	G.C.	17	yes	8/15	yes	parents	approved	no
80-P-3	P.V.P.	20	yes	8/13 (phone)	yes	none	approved	no
80-P-4	P.T.	18	no	9/16, 10/1	partial	parents, P.T., County, Commonwealth	disapproved	yes
80-P-5	M.R.	15	yes[1]	9/9	yes	none	approved	no
80-P-6	E.M.	21	yes[1]	8/25	partial	none	conditional approval	no
80-P-7	W.M.	21	yes[1]	8/25	partial	none	conditional approval	no
80-P-8	L.B.	21	yes	8/25	partial	none	conditional approval	no
80-P-9	R.S.	17	yes	8/26	yes	none	approval	no
80-P-10	S.P.	18	yes	9/2, 10/9	yes	none	conditional approval	no
80-P-11	N.T.	21	yes	9/3	partial	none	approval	no
80-P-12	S.M.R.	-- dismissed prior to hearing, --						
80-P-13	R.A.P.	21	yes	9/3, 10/15	yes	none	approval	no
80-P-14	M.Z.	18	yes	9/9	yes	none	approval	no

80-P-15	J.H.	19	yes	9/5	yes	none	approved	no
80-P-16	G.W.	19	no[2]	9/29, 9/30, 10/7	yes	parents, G.W., Commonwealth	approved	yes
80-P-17	J.S.	22	yes (sister)	10/14	partial	County	deferred decision -- pre-placement visit	no
80-P-18	W.P.	22	yes	10/15	yes	none	approved	no
80-P-19	R.G.	22	yes (sister)	10/24	yes	none	approved	no
80-P-20	D.O.	21	yes	10/31	yes	none	approved	no
80-P-21	-- Report of Hearing Master not yet filed --							
80-P-22	M.J.	20	yes[3] (certified advocate)	10/31	yes	County	approved	no

* Although by far most of the residents of Pennhurst are adults, pursuant to the District Court's Order of June 8, 1979, these hearings have involved the movement of school-age children to community placements.

** Hearings were held in all cases, except for those indicated by (phone). In these instances, the parent called to express approval of the plans for transfer, and as there were no unresolved issues regarding the move, to which all parties consented, there was no hearing.

Additional notes on page 7-C

1. In addition, the Certified Advocate appointed for the client approved the transfer.
2. In this instance, the parents opposed the transfer but the Certified Advocate was in favor of the placement.
3. This client has no parents, but her appointed Certified Advocate favored the placement.

SUMMARY OF ARGUMENT

Mandamus Should Be Denied

1. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." Kerr v. United States District Court, 426 U.S. 394 L976). A lower court must have usurped power and acted outside of its jurisdiction, or refused to perform a duty, for the writ to issue. Here, the District Court exercised its conceded jurisdiction with wisdom and restraint.

2. Petitioner has no standing to seek mandamus. This group of institutional employees and parents who oppose the relief granted below has standing to assert only claims by parents who object to "forced" movement of minor children. It has no standing to object to the movement of others who wish to leave the abominable conditions at Pennhurst or those who desire the protection of the District Court for their services outside the institution. In the only actual case of objection presented in the petition, that of G.W., a hearing is scheduled in the District Court to hear the same objection submitted here. In addition, having failed to appeal the disputed July 14, 1980 order, the petitioner has no standing now to seek mandamus. In re Humes, 149 U.S. 192, 194 (1893); Re Rice, 155 U.S. 396 (1894).

3. Confronted with this Court's near total denial of petitioner's six-pronged attempt to stay virtually every portion of the District Court's prior and future orders, the District Court had a duty to interpret the meaning of this Court's June 30, 1980 Order. From 1795 until today, this Court has held that discretion which vests in a lower court to make judgments and interpret the law is never a fit subject for mandamus. United States v. Lawrence, 3 U.S. 42, 53 (1795); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978). If this Court intended Judge Broderick to exercise his judgment upon receipt of its stay order, mandamus cannot be used to override that exercise.

4. Mandamus is not appropriate because other remedies, including appeal, are presently in process. The very question presented

in the mandamus petition is pending below in both the Court of Appeals (3d Cir., No. 80-2341) and in the District Court (in a motion for stay and exceptions to two placement reports). Where another remedy is available, mandamus may not be invoked. Helstoski v. Meanor, 442 U.S. 500 (1979). Mandamus is not a substitute for appeal, even if hardship and delay result. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Ex parte Fahey, 332 U.S. 258 (1943); Kerr v. United States District Court, 426 U.S. 394 (1976).

5. An interlocutory order of a trial court is not subject to review on mandamus except in the rare case of a pattern of repeated and flagrant violation of clear rules of law. E.g., Will v. United States, 389 U.S. 90 (1967); LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), or in similarly unusual cases such as Ex parte Peru, 318 U.S. 578 (1943), touching on delicate foreign relations matters. The strongest argument petitioner could make in this Court is that, with certiorari granted, the Court must make a special effort to supervise interlocutory orders below which might be made unnecessary by the Court's ultimate ruling on the merits. The identical contention has been rejected by the Court in Ex parte Wagner, 249 U.S. 465 (1919). Just as other interlocutory orders in district courts are held insulated from mandamus review, so too the order below and the reports of the Hearing Master should be reviewed only in the normal course.

6. Assuming that the District Court was wrong in its interpretation of the Court's stay order, that error is not subject to correction on mandamus. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Ex parte Burtis, 103 U.S. 238 (1881).

7. The four month delay between the challenged order of July 14, 1980 and the filing of the mandamus petition, of itself, is ground for denial of the extraordinary writ. Re Eastern Cherokees, 220 U.S. 83 (1911); Re Hohorst, 150 U.S. 653 (1893).

Alteration of the Stay

8. Petitioner's alternative prayer for an expansion of the existing stay should be denied. There is no basis for granting now what was denied five months ago.

9. The long and unexplained delay "vitiates much of the force of their allegations of irreparable harm." Beame v. Friends of the Earth, 434 U.S. 1310, 1313.

10. Petitioners did not appeal the challenged order and sought no stay from the District Court or the Court of Appeals.

11. Where an alternative mechanism to resolve disputes exists, where 1000 people at Pennhurst would suffer to avoid speculative injury to an unidentified handful, and where a blanket stay would be tantamount to a decision on the merits, a stay should be denied.

12. The status quo -- carefully planned provsion of state and county-designed services in the community and protection from abuse of people in the institution -- has been in uninterrupted operation for two and one half years. The Court declined to interrupt that status quo in June of this year. Only denial of a further stay will preserve the status quo. Houchins v. KQED, 429 U.S. 1346 (1976).

13. Plaintiffs below would be irreparably harmed by a stay. The findings of the District Court on the harms of Pennhurst are uncontradicted and unchallenged. People whose placements are in process, who are in pre-placement visits and who desire and need to leave Pennhurst, would be left in the lurch by the precipitous and dangerous stay requested.

14. Petitioner alleges no harm to itself to justify any further stay than the one obtained in June, 1980. The state and counties, implementing their own policies of deinstitutionalization, suffer no harm.

ARGUMENT

I. Mandamus, especially as the behest of a petitioner with no standing, is inappropriate where no extraordinary circumstance exists, where petitioner delayed four months in seeking relief in this Court and sought no relief below, and where other adequate remedies, including appeal, are in process.

A. There being no "clear and indisputable" right and no "judicial usurpation of power," mandamus may not be invoked.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." Kerr v. United States District Court, 426 U.S. 394, 402 (1976), where there is a "judicial 'usurpation of power,'" id., quoting Will v. United States, 389 U.S. 90, 95 (1967). The right must be "clear and indisputable." Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978). Mandamus is used to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Will, supra, 437 U.S. at 662.

Despite the strenuous attempt of the petitioner group, which includes employees at the institution, to mold the facts to their liking, there is no extra-jurisdictional action of the court below and no failure to exercise a duty. There is no clear and indisputable right to the relief sought because the cautious District Judge[4] exercised his authority in a legitimate and restrained fashion.

Although, in justice, the inquiry should stop here, an examination of the other considerations in mandamus, conducted in the folowing pages, further supports prompt and summary denial of the petition.

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4. Hon. Raymond J. Broderick, whose dissenting opinion was cited with approval by the Court in Secretary v. Institutionalized Juveniles, 442 U.S. 640, 645 n. 7 (1979), was similarly careful here to balance competing interests in accordance with this Court's action. Petitioner's attempt to confuse the "voluntariness" of placement with the "involuntariness" of confinement to Pennhurst in the absence of alternatives defies logic or sense and was not accepted by the Court below.

B. Petitioner has no standing.

There is no standing in the petitioner to seek mandamus.

Petitioner for mandamus is an organization of employees of Pennhurst and some parents who oppose the relief granted below. The group here asks the Court to prohibit even voluntary movement from being approved by the court below, even for minors with parents who vigorously support the movement, despite that court's conceded jurisdiction over the parties and duty to protect respondents from injury and abuse.

The petitioner has standing to assert only claims by parents who object to "forced" movement of minor children. Petitioner has no standing to interfere with movement of minor residents with parental support or adult residents who wish to leave.

In the only actual case of objection presented in the petition, G.W., there are pending in the District Court exceptions and a motion for stay. A hearing is scheduled for the near future and, of course, nobody knows what the result will be. Petitioner certainly cannot bring that hypothetical case here at this time.

In addition, having failed to appeal the disputed July 14, 1980 Order, petitioner cannot now circumvent that failure thorugh mandamus. See Section D below.

There is no standing in petitioner to obtain the relief sought. See In re Humes, 149 U.S. 192, 194 (1893)(mandamus denied; petitioners not parties to the writ of error and "not so concerned in the execution of the mandate as to be entitled" to mandamus review); Re Rice, 155 U.S. 396, 403 (1894)("where the application is made by a stranger").

C. Mandamus cannot issue to override the District Court's exercise of reasonable judgment in implementing this Court's June 30, 1980 Order.

Confronted with this Court's near total denial of petitioner's six-pronged attempt to stay virtually every portion of its prior and future orders, the District Court had a duty to interpret the language granting a narrow partial stay "to the extent that the judgment mandates the movement" of people from Pennhurst.

This duty to interpret involves of necessity an exercise of judgment and discretion and requires review of existing orders, motions, the parties' positions and the burdens to be borne by the participants in the litigation and the public interest. This Court having wisely chosen not to dictate the manner in which its stay action was to be effected, the District Court initiated proceedings and entered a limited order.

Since at least 1795, this Court has held that it has "no power to compel a Judge to decide according to the dictates of any judgment, but his own." United States v. Lawrence, 3 U.S. 42, 53 (1795)(denial of request by U.S. Attorney General for mandamus to District Judge). This principle has not been eroded since; discretion which vests in lower courts is never a fit subject for mandamus:

> Although the District Court's discretion may be subject to review and modification in a proper interlocutory appeal, [citation omitted] we are convinced that it ought not to be overridden by a writ of mandamus.

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978)(note omitted).[5]

Only where a ministerial duty leaves no room for any discretion is mandamus appropriate; thus, mandamus is approved where

> There is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law, and the

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5. Accord, Ex parte Hoyt, 38 U.S. 279 (1839); United States ex rel. Goodrich v. Guthrie, 58 U.S. 284 (1855); Ex parte Brown, 116 U.S. 401 (1886)("This rule is elementary"); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).

> act required to be done is, in every just sense, a mere ministerial act.

Kendall v. United States, 37 U.S. 524, 614 (1838).[6]

If this Court intended Judge Broderick to exercise his judgment upon receipt of the June 30, 1980 Order, mandamus cannot be used to override that exercise.

D. Other remedies, including appeal, are in process, thereby rendering mandamus inappropriate.

The very question presented in the mandamus petition is pending below in both the District Court and the Court of Appeals:

1. Before the District Court are exceptions to the Hearing Master's Reports in Nos. 80-P-4(refusing to approve placement) and 80-P-16 (approving placement). Both raise the question of interpretation of the stay. A hearing in 80-P-16 is set for the near future.

2. Before the District Court is a Motion for Stay regarding the adult Pennhurst resident G.W. whose parents (affiants on the mandamus petition) seek to use this Court's stay to prolong his confinement at Pennhurst for reasons the Hearing Master carefully scrutinized (see opinion of Hearing Master, attached to mandamus petition), the County and the Commonwealth explicitly testified to their support of his placement in the home which awaits him. The stay motion pending in the District Court addresses the mandamus issue.

3 Before the Court of Appeals is the Commonwealth's appeal from the July 14, 1980 Order at issue in this mandamus petition (3d Cir., No. 80-2341.

Where another remedy is available, mandamus may not be invoked; only in the absence of any other means of asserting a claim can the extraordinary writ be employed. Chief Justice Burger,

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6. Even the payment of a judge's salary has been held a non-ministerial act insulated from enforcement by mandamus. United States ex rel. Goodrich, supra note 5.

quoting and adding emphasis to an earlier opinion, recently expressed this principle for the Court:

> The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary writ, may not be done with it. It lies only when there is practically no other remedy.

Helstoski v. Meanor, 442 U.S. 500, 505 (1979), quoting, Ex parte Rowland, 104 U.S. 604, 617 (1882).[7]

An appeal and other reviews are pending in the case at bar, not merely available. Mandamus is no substitute for appeal, Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), even if hardship and delay result. Bankers Life and Cas. Co. v. Holland, 346 U.S. 379 (1953); Ex parte Fahey, 332 U.S. 258 (1947); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27-28 (1943); Re Rice, 155 U.S. 396, 403 (1894)(mandamus unavailable even if no appeal is permitted by law); Re Humes, 149 U.S. 192 (1893); U.S. Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196, 202-203 (1945).

Where the Court was asked to order a district judge to vacate an order, mandamus was denied with this explanation of the writ's relation to appeals:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

Ex parte Fahey, 332 U.S. 258, 260 (1947). Here, where the petitioner has failed to exhaust pending review opportunities (this petitioner has even failed to appeal), failed to seek stays or mandamus relief from the courts below, failed to seek a rehearing below, and waited four months to file this mandamus petition, there is obviously no basis for finding mandamus the only available remedy.

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7. Accord, Kerr v. United States District Court, 426 U.S. 394, 403 (1976)("no other adequate means to attain the relief"); Re Rice, 155 U.S. 396, 403 (1894).

Where "an alternative, less extreme, path to modification of the challenged" order is available, mandamus is denied. Kerr v. United States District Court, 426 U.S. 394, 396-397 (1976).

E. Mandamus is inappropriate to disturb an interlocutory order which does not affect the merits.

After review on the merits on appeal and a final judgment in this Court, mandamus is proper to ensure that the decree is given full effect below. [8] However, an interlocutory order of a trial court is not subject to mandamus except in the rare case of a pattern of repeated and flagrant violations of clear rules.[9] E.g., Will v. United States, 389 U.S. 90, 104, 105 (1967)(no showing of "deliberate disregard" of criminal discovery rules; mandamus denied); LaBuy v. Howes Leather Co., 352 U.S. 249, 258 (1957)(repeated improper actions by district court; mandamus granted); Ex parte Burtis, 103 U.S. 238 (1881)(mandamus denied to compel subpoena obedience); Re Hawkins, 147 U.S. 486 (1893) (mandamus denied to compel receipt of evidence).

The strongest argument petitioner could make in this regard is that, with certiorari granted in the case, this Court has a special duty to supervise implementation below on interlocutory matters. In the only case on point discovered by counsel, this Court rejected the identical contention. In Ex parte Wagner, 249 U.S. 465 (1919), two related cases had been heard in the Sixth and Second Circuits; after certiorari had been granted in one case, the question arose whether the trial court could require an accounting (which might prove valueless, depending upon the Court's decision on the merits) pending the Supreme Court's plenary review. The Court denied mandamus:

> Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall

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8. Vendo Co. v. Lektro-Vend Corp., 434 U.S. 424, 427 (1978); General Atomic Co. v. Felter, 436 U.S. 493 (1978); In re Sanford Fork and Tool Company, 160 U.S. 247 (1895). Cf., Ex parte Whitney, 38 U.S. 404 (1839)(clear but single disregard of rules; mandamus denied).

9. One other exception has been a case touching on delicate foreign policy questions. Ex parte Peru, 318 U.S. 578 (1943).

> be. In re Rice, 155 U.S. 396. It may not be resorted to, as the petitioners seek to resort to it here, for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding such proceedings, even though the cost of them cannot be recovered from the opposing party or even though the order cannot be reversed on error or appeal.

Id., 249 U.S. at 471. See also, Kerr v. United States District Court, 426 U.S. 394 (1976)(mandamus denied re discovery orders in class suit).

The handful of reports filed by the Hearing Master, and the absence of any order of Judge Broderick compelling any movement from Pennhurst, and the fact that this Court previously denied a stay of the individual determination process, all suggest that the July 14 interlocutory order is not a fit subject for mandamus review.

F. If the order below was wrong, mandamus is not a proper mode for its correction.

Inapplicability of mandamus to correct errors below, including reversible errors, is a consequence of its inapplicability to discretionary acts. Assuming that the District Court was plain wrong in its interpretation, it may not be made a litigant before this Court and have its error corrected on mandamus. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

Mandamus "does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed." Ex parte Newman, 81 U.S. 152, 169 (1872). Accord, Ex parte Hoyt, 38 U.S. 279 (1839); De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945). The concept was well expressed by Chief Justice Waite:

> The district judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we cannot, by mandamus, compel him to undo what he has done in the exercise

of his legitimate jurisdiction.

Ex parte Burtis, 103 U.S. 238 (1881).

The error, if one there be, will be corrected by the Court of Appeals in the pending appeal, or through this Court's review on the merits. Mandamus does not lie in these circumstances.

G. The four month delay in filing the petition justifies its denial.

Having sought a stay in this Court in June, 1980, and having forcefully litigated its meaning in the District Court in July, 1980, the Petitioner sat on its heels for four months without uttering a word in this Court regarding what it now claims to be disregard of this Court's Order. It can certainly be no coincidence that this mandamus petition is filed on the eve of oral argument

Such delay in seeking mandamus is, of itself, grounds for denial of the extraordinary writ. Re Eastern Cherokees, 220 U.S. 83 (1911); Re Hohorst, 150 U.S. 653 (1893). See, Lucas v. United States ex rel. Heineman Chemical Co., 36 F.2d 1015 (1929); United States v. Carter, 270 F.2d 521 (9th Cir. 1959).

II. Alteration of the June 30, 1980 Order is not appropriate.

Petitioner's alternative prayer is for an expansion of the narrow stay of June 30, 1980. There is no basis for granting now what was denied five months ago.

A. Petitioner's long and unexplained delay since July 14, 1980 in filing this request "vitiates much of the force of their allegations of irreparable harm." Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (Marshall, J., as Circuit Justice).

B. Petitioner did not appeal from the challenged order and has not sought a stay from the District Court or the Court of Appeals.

C. Where an alternative mechanism for dispute resolution and assessment of injury is in place, as here, a blanket stay is unnecessary. Cousins v. Wigoda, 409 U.S. 1201, 1205 (1972)(Rehnquist, J., as Circuit Justice); O'Brien v. Brown, 409 U.S. 1 (1972)(per curiam).

D. A stay of an order granting relief to 1000 people at Pennhurst should not be granted to avoid speculative injury to a handful. See Wasmuth v. Allen, 85 S.Ct. 5, 6 (1964)(Harlan, J., as Circuit Justice)(school testing).

E. The blanket stay requested would be tantamount to a decision on the merits and should not be granted without full hearing. National Socialist Party of America v. Village of Skokie, 434 U.S. 1327 (1977)(Stevens, J., as Circuit Justice); Cousins v. Wigoda, 409 U.S. 1201, 1205 (1972)(Rehnquist, J., as Circuit Justice).

F. The status quo -- carefully planned provision of state and county-designed services -- has been in uninterrupted operation for two and a half years. The people receiving services require the protection of the lower court's orders. See affidavits H through N, attached hereto. The Court declined to interrupt that status quo in June of this year. Only denial of a further

stay will preserve the status quo. Dayton Board of Education v. Brinkman, 99 S.Ct. 27 (1978)(Stewart, J., as Circuit Justice); Houchins v. KQED, 429 U.S. 1346 (1976)(Rehnquist, J., as Circuit Justice). A stay would throw a complex and delicate system into chaos.

G. Plaintiffs below would be irreparably harmed by a stay. The findings of the District Court on the harms of Pennhurst are uncontradicted and unchallenged. Adult Pennhurst residents who desire to leave Pennhurst would be unnecessarily confined under an illegal regime. People whose placements are in process and for whom services are now available would be denied the Hearing Master's review to ensure safety, voluntariness and habilitation. People now free of Pennhurst and appropriately placed would be without the protection of court orders on which they have relied. See attached affidavits, including the affidavit of Abraham Zlotnikoff, now 76 years old who spent 70 years at Pennhurst and who now works, is cooking, bowling and doing his own laundry, all in a community living arrangement developed as a result of the lower court's orders. Not only are there people now at Pennhurst who are preparing to leave but there are people now living in a community facility on a pre-placement visit, but still on Pennhurst rolls, whose fate will be a return to Pennhurst if this Court expands the stay.

H. Petitioner will not be harmed by the maintenance of the stay now in effect. The Association alleges no harm to itself or its members. The Commonwealth and the Counties, approving every placement, suffer no harm except the necessity to occasionally modify a proposal. Apart from implementing their own notions of community placement, the Commonwealth simply seeks to be left alone to do as it sees sit, as if there had never been a trial, findings of liability, and the repeated refusal of the defendants to come up with a plan of their own to remedy the harms to plaintiffs.

CONCLUSION

For the above reasons, the petition for mandamus and prohibition and the request for expansion of stay should be denied. This belated request, timed to obfuscate the issues to be presented shortly in oral argument, has no merit.

Respectfully submitted,

David Ferleger, Esquire*
Penelope A. Boyd, Esquire

37 S. 20th Street, Suite 601
Philadelphia, Pa. 19103
215-567-2828

* Attorney of Record

On the Brief:

Virginia Raymond

Report of Visit
Pennhurst Center
Spring City, Pennsylvania
June 28-29, 1980

I. Introduction

At the request of the Office of the Special Master, Federal District Court, Pennhurst Center was visited by James D. Clements, M.D., and John W. Gallagher, M.D., on June 28-29, 1980, for purposes of gaining an overview of medical and related services, with particular emphasis upon the institution's recent mortality experience.

The practice of medicine is both an art and a science. In a closed institutional environment it is imperfect at best due to the kaleidoscopic influences, both physical and mental, affecting clients' well-being. Observations of behavior or lack of behavior, so important in determining peoples' states of health, are difficult to collect consistently due to the multiple authority figures who in effect govern the lives of institutionalized retarded people -- a multiplicity brought on by staff turnover, reassignments, shift changes, overcrowding, etc. Even when data collection is consistent, its interpretation may be confounded by this fragmentation of authority figures or by failure to consider physical (often neutrally-perceived) discomfort as a cause of severe maladaptive behavior in these unable to verbalize their pain. It is therefore mandatory that the large, variable, and sometimes discordant group of individuals, both direct-care and professional, who govern the lives and efforts on behalf of the people they control: precise observations succinctly recorded, carefully individualized [illegible] treatment techniques must be drawn together into [illegible] practice. This principle surely applies most truly to institutional medical practice: because of physicians' unique authority bestowed by law and custom

A1 Exhibit A

to order that institutionalized persons be treated in some particular way, they have the highest possible moral and legal duty to practice according to this standard. At Pennhurst, we find that for a wide variety of reasons this duty is often not fulfilled.

II. Observations

Due to the limited time available for this visit, observations were necessarily selective rather than comprehensive. Prior to our visits we examined in detail portions of records supplied to us for over forty Pennhurst clients who had expired during the period March 1978 through June 1980: this review included death summaries prepared by physicians, and where available, autopsy reports. Some of these were designated for more detailed record review during our visit. In addition, in order to obtain a retrospective on current patterns of care records of several living clients were also examined on site, and observations made of these clients' living environment and general condition. Comments about a number of these clients will be offered below.

Records of deceased and living clients shared certain characteristics. We found gaps, sometimes of several months, in documents' dates; these gaps were often just prior to the terminal event. Progress notes were fragmented and multidisciplinary, creating misunderstandings: for example, one "discipline" staff member would note that the resident appeared ill while on the same day, on the same record, another would note that the resident was doing well. In many instances, in the records of deceased residents, it became obvious that signs of problems were present long enough before the

terminal event, that if heeded and acted upon could prevent death or mitigate the threat of serious accident or disease.

Item: resident J S , who died in January 1979 after strangling on a sock, was known to have passed a sock in his stool several days earlier; late the previous month he was known to have ingested yet another sock, and the next day a "non-nutritive substance". The medical response to these previous episodes consisted of an order that he wear "muffs" (presumably some kind of restraint mitten): no evidence could be found that the use of the muffs was monitored, nor that the behavior in question had abated; neither was there any evidence of attempts to eliminate the behavior through appropriate training.

Item: M N expired in May 1978 from complications of congenital heart disease. The record shows that cardiology consultation to evaluate the possibility of corrective surgery was recommended by an orthopedic consultant in October 1974; another consultant again suggested this in July 1975. Examination of the record shows no evidence that even the possibility of cardiac consultation was ever seriously entertained for this purpose by Pennhurst staff, let alone the possibility of corrective heart surgery.

Item: D B , whose death in March 1978 was attributed to status epilepticus (autopsy report) was taking four different anticonvulsant drugs: despite persistence of seizures over eight about once per month, no reports of nor orders for anticonvulsant drug blood levels could be found in his record.

Item: M B , whose death in October 1978 was attributed to seizures, had had a series of severe seizures on May 18, 1978, at which time he was taking Dilantin and phenobarbital. The attending physician increased the dose of Dilantin the next day, but blood levels of phenobarbital and Dilantin performed three weeks later showed that both drugs were still being given in sub-therapeutic amounts. Despite this evidence of inadequate therapy, during the remaining 4 1/2 months of the resident's life the physician neither changed the dose of these drugs nor documented any reason for not doing so.

The cases cited above typify the standard of medical care shown in the records which we reviewed. Problems of this kind could surely be ameliorated by better coordination and standardization of medical and medically-related care at Pennhurst, together with more consistent efforts by all staff members to identify and respond in a more sensitive and individualized manner to each resident's needs.

In literally all the records reviewed, of Pennhurst residents both living and deceased, it can be stated that documentation of the process of medical diagnosis and treatment is scandalously poor. Though it is often possible to trace (and with the use of informed imagination, to justify) the management of acute ailments (pneumonia, etc.), it is just as often not possible to do so with chronic ones. Multihandicapped patients regularly receive long lists of medications of various kinds while having no stated diagnoses, signs, or symptoms which would explain the drugs' use. In Capitol Hall I, for example (which we visited because of its rather high incidence of resident deaths), we commonly found residents receiving from six to twelve or more medications,

of which many have serious known adverse side effects, with literally no identifiable justification for using them. Why, for example, does F F receive Thorazine and Valium? Valium, it might be speculated, relieves her spasticity; but nowhere is there an observation as to whether her spasticity is in fact improved by it: instead, one finds Valium reordered, month after month, in a shopping list of medications written by (presumably) a nurse and signed, by rote, by a physician. Does Ms. F show or not show tardive dyskinesia, a known side effect of Thorazine? We cannot tell from the record; all we know is that Ms. F receives Thorazine for an unidentified reason. Why has she for at least the past fifteen months received Tagamet, a drug indicated for short-term (a few weeks to a few months) treatment of upper gastrointestinal ulcers or bleeding? The record is silent on this. While we ourselves might in rare cases use Tagamet for longer periods than indicated by its present FDA-approved labelling, we would insist on proper documentation of the reasons for doing so, and the result thereof. Such documentation is absent from Ms. F 's record. And why does she receive Diazide, a diuretic capable of further compromising her already borderline hydration status, when there is no documented indication for it in her record?

While in Capitol Hill I we reviewed the [illegible] of A R , who has multiple motor handicaps in addition to a seizure problem for which she receives Dilantin. In recent months Ms. R has been in a poor state of health: she was admitted to a Pennhurst infirmary unit several weeks ago, and while there the concentration of Dilantin in her bloodstream was found to be excessively high. This problem was treated with good results in the infirmary, according to the record, and she was transferred back to Capitol Hill I: since then, according to the record and to staff members whom we interviewed, her condition

has again seemed to deteriorate, with progressive difficulty in maintaining adequate oral intake of food and fluids. It is our experience that inadequate food and fluid intake can result in concentration of drugs such as Dilantin to toxic levels, but no Dilantin blood level test has been done on Ms. K since the beginning of her latest deterioration. To us this suggests at the least inattention to a known risk factor. If such is not the case, it is not documented in her record.

The effects of poor documentation of the medical diagnosis/treatment paradigm are extensive. Pennhurst currently utilizes an "after hours" (night and weekend) medical coverage system which places a premium upon the ability of part-time physicians to assess and treat acute problems in residents whose long-term medical conditions, and the rationale for medications being used to treat those conditions, is at best occult and obscure. The same may be said of Pennhurst's own medical staff when a resident's regularly-assigned physician is absent for whatever reason (vacation, sick leave, etc.), the result is clearly a dangerous situation for any Pennhurst resident whose medical condition is fragile. This problem extends even to the formal annual physical exams which we generally found on most charts: these exams tend to be extremely sketchy and superficial, and generally conclude only with a single diagnosis of "mental retardation", even where powerful drugs such as Tagamet and Dyazide, which have no known use in treating mental retardation per se, are being used. One can only conclude from such documentation that drugs are being prescribed irriationally, or as is more probably the case, that drugs which have or once may have had some relevance to medical problems are being prescribed without continuing evaluation of the client's present needs. (The problem is compounded, incidentally, by use of two different forms for physical

examinations, varying from client to client: one of these forms is really only a "review of systems" which is quite inadequate for such use, not having even space for such essential information as vital signs (blood pressure, pulse, respiratory rate, temperature).

Use of psychotropic medications is particularly problematic. Orders for these drugs are regularly written without a precise statement or description of behaviors which they are intended to control. The result is that staff who provide day-in day-out care have no specific information concerning behavioral observations needed to assist physicians in assessing the effects of these drugs: consequently behavioral observations, when recorded at all, are couched in vague and highly subjective terms. This problem extends even to those clients who are regularly seen by a psychiatrist: this consultant's notes consistently contain recommendations for psychotropic treatment based on sketchy information whose source is not documented. The record of one deceased client, L C , contains an unfortunate example of the kind of therapeutic chaos which can result from this situation. Mr. C 's monthly Team Leader Note for May 1977 complains that the attending physician refused to prescribe psychotropic medication despite the psychiatrist's recommendation to do so, and suggests that this refusal constituted a violation of Mr. C 's human rights. Four months later the Team Leader reported that the Unit Director had appealed to the acting Medical Director for institution of psychotropic drugs. Two months later still, and again three months after that, the psychiatrist noted that Mr. C was receiving no psychotropic medications but behaving acceptably. Finally, in utter confusion over this series of events, the psychiatrist recommended (April 6, 1978) that Mr. C should "continue with current medications", even though he was receiving none, because he was "adjusting well to modular". With documentation such as exists at Pennhurst, the psychiatrist's confusion is hardly surprising.

III. Programming

In the above section of this report we emphasized inappropriate and poorly-informed use of psychotropic drugs at Pennhurst; we did so because such practices are generally symptomatic of inadequate pr lanning and program execution. Developmentally disabled people are often unable to arrange their environment to suit their emotional needs, and resort instead to maladaptive behaviors. Using drugs to suppress these behaviors may serve as a convenient substitute for programs designed to help alleviate disability, but the long-term result is that disability is perpetuated rather than relieved.

Psychotropic medication is overused, and used as a substitute for progra on a large scale at Pennhurst. In Quaker Hall (second floor) twelve records were reviewed. Eleven individuals were on psychoactive drugs, and one of these, R G , was on five psychoactive drugs simultaneously. In no instance of any record examined was there documentation of less restrictive methods of behavior modification being tried, nor did any of the annual Program Reviews reflect any serious attempt to address the issue of replacing psychoactive drugs with more constructive forms of behavior management. Indeed, the annual Reviews are so lacking in medical input (other than routine health-maintenance nursing matters) that we have the impression that Pennhurst physicians are not really looked upon as part of the program team, but rather as detached professionals whose actions are beyond the realm of team discussion.

Finally, we noted that the Pennhurst Infirmary is being used as a "last resort" placement for residents who continue to exhibit unmanageable behaviors despite drugging. In the absence of even a trial of a program of carefully designed behavior management, this practice is clearly highly restrictive and inappropriate.

IV. Health-related environmental issues

One of the most serious problems observed, and noted from the records, which affects not only the mental and physical health of the residents but also their continuing general development and well-being, was their universal and all-pervasive idleness. While ultimately affecting residents' emotional and intellectual development, the most immediate and obvious effects are accident, injury, self-abuse, and abuse by staff. We observed repeated instances of staff abusing residents by shouting across the room to residents and to one another - a form of abuse which while it may be unintentional is one against which many residents have little defense, and little capacity to respond except through self-stimulation and other maladaptive behaviors. The abundance of aberrant behavior is a sign of Pennhurst's emotionally depriving environment.

We observed one lunchtime meal in Capitol Hall I, and saw a number of problems. Many wheelchairs were not properly adapted either for posture or for use at mealtime: some were too high to fit under the tables, requiring their users to reach too far to feed themselves comfortably; in others a built-on tray was so high as to make self-feeding awkward. Unsupervised stealing of food was noted. Non-self-feeding residents were being fed hurriedly, using the dangerous technique of raking food off spoons by drawing them upwards over the upper teeth - an open invitation to choking and aspiration. Rarely could we locate prescriptions for proper amounts of fluid intake, or records of urinary output.

V. Record-keeping practices

We have already mentioned two problems encountered in Pennhurst's record system: lengthy gaps in records, and use of different forms for annual physicals, at least one of which is not suited for that use. Another problem

is the way seizure records are kept. Staff members are instructed to record seizures individually on small slip-like forms which are later taped into the record, often mixed in with laboratory reports and other forms of similar size. While the convenience of this system may help insure that seizures are in fact recorded, we suspect that it may also be detrimental to medical management: instead of being able to see a running summary of seizures written down in a single place, the physician, in order to observe trends in seizure frequency and thus to correllate them with previous modifications of anti-convulsant regimens, must riffle through page after page of slips, abstracting dates along the way. Such a procedure is time consuming, and ultimately must interfere with timely and comprehensive anticonvulsant review. The fact that numerous deaths from seizures have occurred at Pennhurst suggests that this record-keeping practice is not only inconvenient but dangerous as well.

Physician progress notes are extremely difficult to follow because they are kept in different places, using different forms. Infirmary progress notes may or may not be on a form provided for that purpose; residential unit notes are kept on at least two different forms, one of which contains parallel columns for notes and orders, the other being for notes only. Physicians and nurses alike use these forms, and many of the nurses' notes appear to be substitutes for physician notes (for example, the nurse might record that "Dr. Jones examined Mary because of fever. He found such-and-such and prescribed so-and-so". This practice we consider hazardous, and believe that it should be used only in unusual circumstances, such as when the physician is called to another area for an emergency before being able to record his own findings. The net effect of these progress note practices is to fragment the record of the resident's care, making it difficult to audit and difficult to use, particularly for "after hours" physicians who may not have continuing familiarity with the case.

VI. Summary and Conclusions

Medical care at Pennhurst, for a variety of reasons, is inadequate. Viewed in terms of traditional medical care, Pennhurst residents do not receive periodic comprehensive assessment of their condition, their progress, and their long and short term medical needs. This leads, for example, to rote reordering of and exposure to side effects of drugs for which the original need has long since become obscure; inattentive seizure management; failure to evaluate chronic life-threatening conditions which may be highly treatable; and failure to take effective action to eliminate known life-threatening behavior.

In terms of contemporary standards of practice in a residential facility for the retarded, medical services at Pennhurst suffer most on account of almost total lack of participation in an interdisciplinary process of resident program planning, implementation, and review. The single most pervasive effect is that maladaptive behaviors are overwhelmingly dealt with by use of psychotropic drugs, which do nothing to promote development and may actually retard it, rather than by using behavioral and educational programs which if well-designed and carefully implemented can be a powerful adjunct to promoting development. The problem is compounded, however, by the apparent lack of the other services crucial to implementation of the interdisciplinary model, and by a sense of professional distance - even antagonism - between Pennhurst's physicians and its other disciplines.

VII. Recommendations

Many observations are offered in the sections above whose need for corrective action, and the nature of that action, will be readily apparent. Those offered below are intended to complement the foregoing.

1) There must be a careful orientation of the new Medical Director to problems of Pennhurst's medical program.

2) Provide a continuum of "sensitivity" raising medical grand rounds monthly for one year. Then the effectiveness of this, including the need to continue, should be evaluated.

3) Provide a mandatory continuing education program for all physicians, emphasizing the interdisciplinary and developmental models. These programs are offered in many of the so-called University-Affiliated Centers.

4) Physicians' case loads should be no more than 1:0 clients.

5) Use of separate physicians for night coverage should be discontinued. Physician assistants might be employed full time to assist in night coverage as well as for other "physician-extender" functions including interdisciplinary team meetings.

6) Verbal orders by physicians should be minimized. When orders are written, the purpose of the order, expected results, and the more frequent side effects of the drug, if pertinent, should be recorded.

7) Progress notes of all disciplines, including physicians, should be melded, whenever possible, to present a more accurate and meaningful status report of the resident.

8) A critical review of long term medication should be done at least monthly, stating the purpose of the drug, results, and reason for continuing the drug.

9) There should be a monthly review of accidents, injuries, etc. for the purpose of instigating general preventive measures. Some of these might be the addition of programs (particularly behavioral programs), removal of hazards (slippery floors, etc.), better staff coverage at critical periods (getting up in the morning, bathing, feeding, etc.)

10) A clearer definition of use of outside resources such as outside hospitals, consultants, elective surgery, restorative surgery, etc. should be developed by the medical staff.

11) Ward records should be regularly reviewed for continuity, clarity, and pertinence.

12) The service of a nutritionist should be obtained to assist in ordering individualized diets from a standpoint of total calories, protein, fat, carbohydrates, minerals, vitamins, consistency, liquid intake, etc.

13) Staff who feed residents need special training in feeding techniques.

14) Provision should be made for adaptive equipment including, but not limited to, wheelchairs, walkers, crutches, braces, feeding devices, etc.

15) Monitoring of the use of psychotropic drugs should be considered at the meeting scheduled for July 21, 1980.

Respectfully submitted,

James D. Clements, M.D.

John W. Coolidge, M.D.

OFFICE OF THE SPECIAL MASTER
FEDERAL DISTRICT COURT

649 S. HENDERSON ROAD
2ND FLOOR
KING OF PRUSSIA, PA 19406

(215) 265-5401
(800) 362-0352

PILCOP

AUG - 4 1980

July 30, 1980

Hon. Raymond J. Broderick
United States District Court
10613 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Broderick:

Enclosed is an Appendix to the report filed on July 15, 1980, submitted to me by Drs. Clements and Cooledge. The Appendix adds more detail to the analysis of certain deaths at Pennhurst, and comments on unacceptable medical practices at the institution.

I anticipate that this material will be covered in some detail at the hearing on August 4, 1980.

Sincerely,

Carla

Carla S. Morgan
Special Master

Exhibit A

APPENDIX

to

REPORT OF VISIT

PENNHURST CENTER

SPRING CITY, PENNSYLVANIA

June 28 - 29, 1980

James D. Clements, M.D.

John W. Cooledge, M.D.

I

In preparation for our visit to Pennhurst Center, one of us (J.W.C.) undertook a comprehensive review of the summaries (and where applicable, autopsy reports) of deceased residents which were supplied to us prior to our visit. In order to gain a clearer picture of the occurrence of these deaths on a unit-by-unit basis, and according to the primary physician responsible for each resident at the time of death, we attempted to compile these data in a more readily accessible form. In roughly one-third of these cases we were unable to identify the resident's "home" unit from the materials supplied (in these cases the unit of record at death was identified only as the Pennhurst infirmary or as the Phoenixville Hospital, even if only the last few days or hours of life were spent in those facilities): determination of the "home" unit was therefore based on additional information supplied at our request. Likewise, determination of each resident's primary physician at the time of death was based on a series of schedules, supplied by the Office of the Special Master, indicating the physicians assigned to each unit

over varying dates during the period when these deaths occurred. The information thus compiled is exhibited below in Table I, "Pennhurst Deaths by Unit/Subunit, 3/17/78 - 4/30/80," and in Table II, "Pennhurst Deaths Tabulated According to Primary Physician, 3/17/78 - 4/30/80." These tables do not include deaths subsequent to 4/30/80, summaries of which were provided to us subsequent to our arrival for this visit, though a comment about one of these later deaths will be provided further on in this appendix.

Both of the tables below show residents' names, month/year of death, and in parenthesis, age at death. No attempt has been made to analyze these data for the effects of variables such as unit population; physician caseload; residents' ages at death; or length of physicians' employment.

Table I: Pennhurst Deaths by Unit/Subunit

3/17/78 -- 4/30/78

Infirmary I

F	A	8/79	(68)

Eisenhower Unit

Devon Hall 1

N	M	5/78	(16)
B	J	1/80	(18)

Devon Hall 2

S	T	12/78	(37)

Devon Hall 3

S	G	10/79	(16)

Devon Hall 4

H	M	10/78	(35)

Eisenhower Unit, cont.

Penn Hall 1

N	W	6/78	(63)
B	J	8/78	(52)
P	R	11/79	(57)

Penn Hall 2

C	L	11/78	(45)

Humphrey Unit

Horizon 2

D	B	3/80	(45)

Horizon 3 West

T	V	2/79	(52)

Horizon 4 West

S	J	1/79	(42)

Independence Unit

Ind. Dr. 6

L	W	4/78	(62)

Ind. Dr. 9

W	S	12/79	(21)

Ind. Dr. 10

M	J	8/78	(52)

Johnson Unit

Industry Hall

B	D	3/78	(18)

Industry Hall 2

M	A	8/79	(18)

Johnson Unit, cont.

Whitman Hall 2

M	A		2/79	(61)
B	M		1/80	(62)

Lincoln Unit

Capitol Hall 1

S	E		5/78	(64)
S		F	12/78	(67)
C	L		12/78	(43)
S	M		1/79	(72)
L	M		7/79	(64)
D		F	3/80	(33)

Pinehill (off-campus nursing home)

C	L	5/78	
F	V	2/79	
R	P	3/79	
J	C	5/79	
S	R	12/79	
G	T	3/80	
D	A	4/80	

Truman Unit

Mayflower Hall 1

F	M	6/79	(61)
V	B	10/79	(32)

Tinicum Hall 1

B	R	3/79	(55)

Washington Unit

Keystone Hall 5

M	M	10/78	(37)
H	C	11/79	(35)

Keystone Hall 7

M	W	4/79	(37)

Keystone Hall 8

G	F	9/78	(52)

Unit 1

Modular 4

S	E	3/78	(64)

Unit 9

Ward 48

M	P	9/78	(73)

LOA/Trial Visit

G	H	3/78	
E	C	4/80	

Table II: Pennhurst Deaths Tabulated According to Primary Physician

3/17/78 -- 4/30/80

Dr. Ausman

S	E	5/78	(64)
H	M	10/78	(35)
C	L	11/78	(45)
S	T	12/78	(37)

Dr. Ausman, cont.

S	G	10/79	(16)
F	R	11/79	(57)
B	J	1/80	(18)

Dr. Dorrance

S	F	12/78	(67)
C	L	12/78	(43)
S	M	1/79	(72)
L	M	7/79	(64)

Dr. Kearney (no longer employed)

M	P	9/78	(73)
S	J	1/79	(42)
T	V	2/79	(52)

Dr. Ja Kim

D	F	3/80	(33)

Dr. Tai Kim

C	B	3/80	(45)

Dr. Robles

B	D	3/78	(13)
M	A	2/79	(61)
M	A	3/79	(18)
B	M	1/80	(62)

Dr. Shields (no longer employed)

S	E	3/78	(64)
N	W	6/78	(63)
D	J	8/78	(52)
M	J	8/78	(52)

Dr. Wilton

L	W	4/78	(62)
G	F	9/78	(52)
M	M	10/78	(37)
M	W	4/79	(37)
H	C	11/79	(35)

Dr. Woo

N	M	5/78	(16)
B.	R	3/79	(55)
P	W	6/79	(61)
V.	B	10/79	(32)
W	S	12/79	(21)

II

In addition to observations concerning specific residents (both living and deceased) cited in the body of our report, we examined the records of several other residents, and offer the following further observations about them, as well as additional comments about certain clients already mentioned. First, we reiterate our absolutely consistent findings concerning poor documentation of the medical care process, lack of physician participation in the interdisciplinary planning process, sketchiness of annual physical examinations, and general lack of medical diagnoses beyond "mental retardation," even when it was evident that other complicating factors (seizures, motor handicaps, etc.) were present.

1. C. D. (currently living in Modular 3 unit): Mr. D presently receives two major psychotropic medications and has regularly

been seen by the psychiatric consultant since at least 1978. Despite this, no behavioral data have been kept which would document specifically why he is given these drugs, or provide the psychiatrist with an objective basis for recommending continuation or modification of drug therapy. The psychiatrist's progress notes document only the sketchiest impression of clinical progress, based on information from unidentified sources.

2. H_____ H____ (deceased): Problems surrounding management of Mr. H 's seizures, which ultimately resulted in his death, are cited in the body of our report. Of additional interest in his case is another example of the inadequacy of psychotropic drug management which we found at Pennhurst. On 10/11/78 the psychiatrist recommended a change of living unit to see if Mr. H 's behavior would be improved thereby, and then stated that "Later a trial on phenothiazines is indicated if he doesn't respond to environmental changes." As of that date, Mr. H was in fact already receiving a phenothiazine (Mellaril), as he had been for at least the previous twelve months, and was receiving another major tranquilizer (Haldol) as well.

3. C____ H_____ (deceased): Mr. H died while on Trial Visit to a community facility in November 1979, ten months after leaving Pennhurst. His medical management at Pennhurst, and the apparent lack of predischarge planning for followup medical care, appear deficient.

Mr. H was diagnosed in July 1977 as having both anemia and a pyloric ulcer (a lesion of the upper gastrointestinal tract which can cause, among other things, anemia due to intestinal bleeding). This was treated with Tagamet and antacid, and a followup October 1977 X-ray study "failed to show" the ulcer previously demonstrated. Mr. H nevertheless continued to be anemic, despite treatment with iron, and eventually a sigmoidoscopy

(visual examination of the lower intestinal tract) was performed in an effort to explain why his stools still showed evidence of intestinal bleeding. This examination was negative. Mr. H was then discharged to trial visit status on 1/11/79, with a moderately severe and still unexplained anemia and a history of pyloric ulcer, a notoriously recurrent medical problem. He died, age 35, ten months after discharge from Pennhurst: available records do not disclose the cause.

Two problems can be cited in Mr. H 's record. First, persistence of anemia in the presence of a recent positive history of pyloric ulcer should raise the question of persistence or recurrence of the ulcer, and should suggest that additional diagnostic study (repeat X-ray study, or better yet, gastroscopy) is indicated. The record shows no evidence that additional study was considered. Second, Mr. H 's case demonstrates inadequate medical discharge planning: nowhere in the record can there be found, prior to discharge, any evidence that those responsible for implementing his community living arrangements were given particular notice that he had a significant set of medical problems for which special followup was needed. Information about these conditions is contained in the medical Discharge Summary dated 1/11/79, six days after discharge, but even this summary contains no suggestions for followup which could have been acted upon by the community agency.

4. L____ C____ (deceased): The body of our report discusses what we termed the "therapeutic chaos" surrounding disagreement between the consultant psychiatrist and the primary physician concerning Mr. C 's need for psychotropic drugs, and the psychiatrist's subsequent confusion as to whether drugs were in fact being given. The initial source of this chaotic

situation deserves comment for purposes of illuminating further our views concerning the use of psychotropics at Pennhurst.

On 9/15/77 the psychiatrist recorded the following in Mr. C 's chart: "Behavior somewhat unmanageable in that he swaggers around at whim and interferes with ward routine." On this basis, he recommended resumption of the psychotropic drug Haldol, which Mr. C had been receiving earlier.

According to the F.D.A.-approved labelling of Haldol which was then in effect (Physicians' Desk Reference, 1977, pp 1026-1027), "Haldol (haloperidol) is indicated for use in the management of manifestations of psychotic disorders. It is also indicated for the control of tics and vocal utterances of Gilles de la Tourette's syndrome."[1] Neither in the note of 9/15/77 nor in any subsequent thereto did the psychiatrist suggest either that Mr. C had either a psychotic disorder, Gilles de la Tourette's syndrome, nor tics or vocal utterances characteristic of that syndrome. The record indicates that Dr. Shields, the primary physician, considered this recommendation inappropriate and refused (despite considerable pressure from other staff members) to implement it.

The unacceptable behavior described by the psychiatrist on 9/15/77 might in fact have been responsive to Haldol, in the sense that the drug's non-specific central nervous system depressant properties might have supressed to an extent his alertness and desire for physical activity, thus reducing his tendency to "swagger around" and to "interfere with ward routine." We suggest

---

[1] Subsequent additions to the approved indications for Haldol include "combative, explosive hyperexcitability" and certain forms of hyperactivity in children: these indications appear inapplicable to this case.

however, that these arguably inappropriate behaviors are hardly surprising in an ambulatory adult man confined to a closed institution: a response far more appropriate than suppressing such behavior with a CNS-depressant drug would have been to insure that Mr. C had access to a variety of suitable, meaningful activities, and that he was provided a training program designed to teach him to participate in them. Almost certainly such training and activities could have led not only to a decrease in the unacceptable behavior, but to relief of boredom and developmental growth as well.

In short, we would agree with the primary physician that the psychiatrist's advice to resume drugging was inappropriate, and that these behaviors should have been addressed through programmatic, not medical, means. Mr. C 's Annual Program Review showed no meaningful attempt to do so.

5. G S (deceased): Ms. S was admitted to the Pennhurst infirmary on 10/3/79, suffering from fever and lethargy following a series of seizures, a constellation of problems with which she had often had difficulty in the past. But despite the fact that she was receiving three anticonvulsant drugs which had just failed to prevent a series of convulsions, anticonvulsant blood levels were not obtained either then or prior to her death six days later.

On the following day, 10/4/79, Ms. S was thought to have tonsillitis (the chart also reveals physical findings compatible with pneumonia), and an antibiotic was prescribed. Her condition appeared to stabilize somewhat over the next few days, but on 10/9 she again showed fever and was switched to another antibiotic: at that time the physician also wrote an order, "Force fluids," apparently because of poor oral intake. That evening, the

Nurses' notes contain the following incredible entry: "Listless--unresponsive [---] fluids forced." Shortly thereafter, at 9:05 p.m., she was found dead.

Aside from the incredible danger of aspiration and suffocation occasioned by "forcing fluids" into a person who is "listless--unresponsive" (the thought of pouring fluids into the mouth of an essentially unconscious person is enough to make one cringe), the features of Ms. S 's case (on paper, at least) are strongly reminiscent of a syndrome which we have repeatedly observed at other facilities, and which (judging from the records) may have been present in several other deceased Pennhurst residents as well. The syndrome is characterized by the presence of (1) a seizure disorder being treated with one or more anticonvulsant drugs; (2) significant motor handicaps, usually to the point that the person is nonambulatory and must be fed by others; (3) chronically marginal nutritional status, or outright malnutrition; (4) cyclic episodes of slowly progressive lethargy (which is usually noticed by staff) and dehydration (which usually is not) due to insidious further failure of oral intake, which leads in turn to (5) progressive concentration of anticonvulsant drugs in the bloodstream to toxic levels. If medical and nursing staff personnel do not keep this syndrome in mind at all times when dealing with such clients, its diagnosis is easily missed, for two reasons: first, standard laboratory tests commonly relied upon to assist in diagnosing dehydration (blood electrolytes, blood urea nitrogen and creatinine) tend to remain within normal limits; and second, changes in skin texture usually associated with dehydration tend to be either very subtle, or to be confused with lack of subcutaneous fat associated with being chronically underweight. The most direct and immediately effective treatment for this syndrome, in our experience, has been institution of

nasogastric tube feeding, by which it is possible not only to effect rapid reversal of the failure of oral intake, but also to avoid the hazard of "forcing fluids" into the mouth of an unresponsive patient.

Our purpose in offering a rather technical description of this syndrome and its treatment is not so much to edify the Special Master as to alert the Pennhurst medical staff, on the assumption that this report will be shared with them.

6. W W (deceased): Mr. W expired on 6/18/80; he thus is not included in the tables in section I of this appendix.

Like J S (cited in the body of this report), Mr. W died of suffocation after aspirating a foreign body--in this case, a paper towel, which he apparently obtained from a bathroom dispenser during a middle-of-the-night stroll around his living unit. Though we did not review his complete record, we did note on the "Facility's Report of Unusual Incident," signed by the Superintendent, that "Mr. W has a history of getting out of bed during the night and roaming around the area." During our visit, we were told, but did not record the source of the information, that Mr. W also had a recurrent history of ingesting paper towels. Though we recognize the hearsay nature of this latter information, we suggest that the Special Master may wish to look further into whether recurrent ingestion of foreign bodies is widespread at Pennhurst, particularly since Mr. S 's and Mr. W 's deaths occurred from essentially identical preventable causes.

Respectfully submitted,

James D. Clements, M.D.

John W. Cooledge, M.D.

JDC:JWC:bw

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.,	:	
Defendants	:	
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor	:	FILED JUL 23 1980
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,	:	
Plaintiffs-Intervenors	:	NO. 74-1345

ORDER

AND NOW, this 22nd day of July, 1980, plaintiffs having on March 6, 1980 filed a motion for contempt in connection with the deaths of Pennhurst residents and having on March 11, 1980 moved for a temporary restraining order in connection with the deaths of Pennhurst residents, which motion was resolved by an agreement of the parties dated March 13, 1980, which agreement provided in part "The Special Master, with the assistance of any consultants retained for that purpose, shall investigate the deaths and report to the Court," which report, prepared by James D. Clements, M.D. and John W. Cooledge, M.D., was submitted by the Special Master and filed with the Court on July 15, 1980, which report states, in part: "Records of deceased and living clients shared certain characteristics. We found gaps, sometimes of several months; in decedents' charts these gaps were often just prior to the terminal event;" ". . . documentation of the process of medical diagnosis and treatment is scandalously poor;" "Use of psychotropic medication is particularly problematic;" "Psychotropic medication is over-used, and used as a substitute for program on a large scale at Pennhurst;" "The abundance of aberrant

ENTERED: 7/23/80

CLERK OF COURT

Exhibit B

behaviors is a sign of Pennhurst's emotionally depriving environment;" and "Medical care at Pennhurst, for a variety of reasons, is inadequate;" the Court hereby ORDERS that defendants Jennifer Howse and George Kopchick and Acting Pennhurst Medical Director William Dorrance, appear on Monday, August 4, 1980 at 10:00 a.m. in Courtroom 10B of this United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania to SHOW CAUSE why they should not be held in civil contempt for violation of the following provisions of Orders of this Court: paragraphs 12, 14 and 15 of the Order of March 17, 1978, as amended April 24, 1980 and paragraphs 3.4, 3.5, and 3.7 of the Order of March 5, 1979, as amended April 24, 1980.

It is FURTHER ORDERED that said defendants SHOW CAUSE why the recommendations made by Drs. Clements and Cooledge which are not already contained in Orders of this Court should not be adopted as Orders of this Court.

It is FURTHER ORDERED that plaintiffs serve true and correct copies of this Order on the defendants Jennifer Howse and George Kopchick and Acting Pennhurst Medical Director William Dorrance.

RAYMOND J. BRODERICK, J.

TABLE I

CURRENT STATUS OF FORMER PENNHURST RESIDENTS

(N=142)

Status	Number	Percent
Persons in Community Programs *	122	85.9%
Persons Returned to Natural Family	9	6.4%
Transferred:		
Pine Hill (ICF-MR)	5	3.5%
Other Institutions	3	2.1%
Deceased	2	1.4%
Community Program Out of State	1	.7%
TOTALS	142	100.0%

NOTE: None of the 142 persons has been readmitted to Pennhurst.

* Of the 122 persons in community living arrangements:

102 are in programs for 3 or fewer persons
18 are in programs for 4 to 6 persons
2 are in programs for 7 to 8 persons

A-30 Exhibit C

TABLE VII

HEARING *

	Relocated to CLA's (a)		Remaining at Pennhurst (b)	
	Number	Percent	Number	Percent
No difficulty in hearing	106	86.9%	873	89.8%
Some difficulty in hearing	9	7.4%	59	6.1%
Great difficulty in hearing	5	4.1%	22	2.1%
No hearing at all	2	1.6%	18	2.0%
TOTALS	122	100.0%	972	100.0%

VISION *

	Relocated to CLA's (a)		Remaining at Pennhurst (b)	
	Number	Percent	Number	Percent
No difficulty in seeing	88	72.1%	710	73.0%
Some difficulty in seeing	25	20.5%	134	13.8%
Great difficulty in seeing	7	5.7%	65	6.7%
No vision at all	2	1.7%	63	6.5%
TOTALS	122	100.0%	972	100.0%

* Data taken from Pennhurst records

(a) N=122

(b) N=972

EXHIBIT D

A - 31

TABLE VIII

AMBULATION *

	Relocated to CLA's (a)		Remaining at Pennhurst (b)	
	Number	Percent	Number	Percent
Walks with no difficulty	84	68.9%	612	63.0%
Limps or walks unsteadily	21	17.2%	194	19.9%
Walks only with help	5	4.1%	55	5.7%
Unable to walk	12	9.8%	111	11.4%
TOTALS	122	100.0%	972	100.0%

DISTRIBUTION BY SEX *

	Relocated to CLA's (a)		Remaining at Pennhurst (b)	
	Number	Percent	Number	Percent
Male	81	66.0%	608	62.6%
Female	41	34.0%	364	37.4%
TOTALS	122	100.0%	972	100.0%

* Data taken from Pennhurst records

(a) N=122

(b) N=972

EXHIBIT E

TABLE X

INDIVIDUALS' VISITS WITH FAMILY IN THE COMMUNITY AND AT PENNHURST

N=106 (1)

	In CLA (a)		At Pennhurst (b)*	
	Number	Percent	Number	Percent
Family visits individual at least monthly	45 (2)	42.5 %	15	14.2 %
Individual visits or takes trip with family at least monthly	36	40.0 %	4	3.4 %

* Data taken from Pennhurst Records.

(a) For the six months after moving to community.

(b) Same individuals for the two years prior to moving to community.

1. 16 individuals of the 122 who moved to the community have no known family.

2. At least 49 individuals have regular contact with other individuals who are not family members.

A-33 EXHIBIT F

TABLE XI

FAMILY PARTICIPATION IN SERVICE PLANNING PROCESS

(N=122)

Level of Participation	Participation in IHP*		Participation in APR**	
	Number	Percent	Number	Percent
All	40	32.8%	3	2.5%
Some	35	28.7%	12	9.8%
None	31	25.4%	89	73.0%
Family Unknown	16	13.1%	16	13.1%
Missing Data	---	----	2	1.6%
TOTALS	122	100.0%	122	100.0%

*Participation in Individual Habilitation Plan (IHP) Process:

All = participated in meetings, reviewed and approved all plans.

Some = participated in meetings, and/or reviewed and approved some plans.

None = no participation

**Participation in Annual Program Review (APR) Process:

Data taken from Pennhurst records for the two years prior to individual's movement to the community.

The Annual Program Review is the mechanism utilized at Pennhurst to design a person's program; family members are invited to participate.

AFFIDAVIT OF ABRAHAM ZLOTNIKOFF

1. I am Abraham Zlotnikoff. I am seventy six years old.

2. I work every weekday at the Elwyn workshop. On Saturday and Sunday I have it easy. At the workshop I do forks, put rubber bands on, do different colored spoons - - white ones and all. I'd like to get a job helping out in the kitchen. I could do that. At Pennhurst I used to work in the kitchen. I dried dishes, dried the pots. Here Marc is teaching me how to cook hamburgers.

3. Today I went bowling, we go to different places. At the school I get coffee. I went for coffee the other night. They show movies at the school in town. They have a screen. We take the train to get to town.

4. I like baseball, basketball, football, and fights. I went around the corner to see a baseball game. Kevin took me to see the game. There's a coke machine at work.

5. I like it better here than at Pennhurst. I help to clean the house up here. They keep their eye on you up at Pennhurst. I've had enough of it -- in the old days -- no more. My brother knows that. I have a room here by myself and I have my own TV.

6. Downstairs we have have a washer and a dryer. I put my clothes in there myself. At Pennhurst they're in charge of that. Here I do my own.

7. I was a resident of Pennhurst for about seventy years. For about the last six months, I have lived at a community placement run by the Unived Cerebal Palsy Association. I live in a house at 49th Street and Parkside, in Philadelphia, with three other residents plus staff.

A35 Exhibit H

I, Abraham Zlotnikoff, hereby declare, under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Date November [illegible]

[signature] 11/11/11

Witnessed

Marc Pomerantz

Hannah M Shanklin

AFFIDAVIT OF MRS. ANTHONY NASIELSKI

1. My name is Mrs. Anthony Nasielski. I am the mother of Paul Nasielski.

2. Paul is sixteen years old. He lived at Pennhurst for about six years. Before that he was at a private school in Delaware for three years. We placed Paul in the Delaware school because at that time there was nothing except Pennhurst for a severely retarded, emotionally disturbed child such as Paul. We also have another handicapped child, who Paul was upsetting. Paul became too difficult for the school in Delaware and we had to place him in Pennhurst. The last place we ever wanted to see Paul was Pennhurst. When we were faced with the reality that he would have to go there, that was very difficult for my husband and myself.

3. As Paul stayed in Pennhurst longer and longer, he seemed to get more and more difficult. It was the wrong kind of environment for him. There was too much distraction and too many people. It was completely the opposite of what he needed.

4. Since this spring, Paul has been living in a community placement in Ardsley, Pennsylvania. It is just marvelous. He receives a lot of tender loving care, and the people who work with him are just wonderful. He has calmed down a lot, although I know he has a long way to go. Last week he had a birthday party, and it was beautiful to see. It has been years since I have seen him like that. He was smiling and very happy.

5. Paul's last year in Pennhurst was especially bad. Apparently he was becoming more aware of things. When we came to visit and had him in the car, he would never want to go back. He would scream and holler and we had to drag him out of the car. It was so painful. Now when we go and visit Paul, he is happy to see us, but he is also obviously happy to be there. For the first time in years I feel I have some peace of mind.

6. I was at first opposed to Paul's moving into the community. I work in the Mental Health Center in Norristown and in Norristown we

 Exhibit I

have the results of all the people being dumped into the community: living in dirty boarding homes, fed inadequately, no proper clothing. All I could imagine was what would happen to Paul. I couldn't conceive of him living in a group home because he needs extensive, individual care.

6. At first I told Paul's caseworker that I would not have anything to do with Paul's moving from Pennhurst, because I didn't think he was going to get that individual extensive care. I told his caseworker that only if Paul received one-on-one staff attention would I consider his transfer. She said that was what he would have. I didn't believe it because there has been nothing like this in the past, but I am open-minded. I agreed to go look at some group homes.

7. One day last summer Paul's caseworker took me around to look at the group homes. I met Mr. Lynch, who runs the homes. In one home, there was a boy much like Paul. He lived in a lovely house with his own bedroom. I saw him rocking in his rocking chair. He had been living there over a year, and there were two staff people at all times. I just sat down and cried, I couldn't believe it.Another boy from Pennhurst had just moved in that day, and they told me this is what Paul could have too.

8. I had many things that I wanted for Paul, many demands and I got them. Paul has trouble sleeping, and I wanted there to be someone there with him. The staff is in shifts, and there is always someone awake there. I asked for door locks, and I got them, although they don't need to keep the doors locked twenty-four hours a day because Paul is watched and he doesn't run out.

9. In my opinion, Paul would definitely not have left Pennhurst without the court order.

Mrs. Joan Nasielski
212 West 4th Ave.
Conshohocken, Pa. 19428

I [illegible] hereby declare, under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

[illegible]

A39

AFFIDAVIT OF PATRICIA DOUGHERTY

1. My name is Patricia Dougherty. I am the sister of Robert Gorman.

2. Robert is twenty two years old. He was a resident of Pennhurst for approximately eight years. Before that he had spent time in St. Edmunds, a Catholic school, and then a state institution upstate.

3. Robbie has been in a community placement in Collegeville since October 1st of this year. It's only been a month, but so far, from what he tells me, he likes it there. It's a beautiful home and he is enjoying it. He goes to a day workshop and so gets out. At Pennhurst Robbie told me he would just sit and watch TV and fall asleep.

4. I wasn't sure at first about the move, but I talked to caseworkers from Delaware County and Montgomery County. Robbie was put with a friend with the same handicap and so was placed in a home in Montgomery County (rather than Delaware County). Everything in the planning for the move was thought out and looked into -- it wasn't just rushed into.

5. I doubt if Robbie would have left Pennhurst without the court order. He probably would have stayed at Pennhurst.

140 Exhibit J

I, Patricia Daugherty, hereby declare, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge, information and beliefs

Patricia Daugherty
11/21/20

A41

AFFIDAVIT OF LEONARD SINGER

1. I am Leonard Singer. I am the father of Lawrence Singer.

2. Larry is now seventeen years old. He has been at Pennhurst for about seven years. He went there because he is retarded, and at that time there was no other place but Pennhurst for him.

3. We're hoping for an alternative to Pennhurst. I want Larry to hae something slse. I want him to be comfortable and placed out of danger. He needs one-on-one or one-on-two care and he is not getting that at Pennhurst. Larry can't protect himself and he has been hurt at Pennhurst. I'm very concerned about his safety.

4. We have been working with the Office of the Special Master and the state to come up with some alternative. We've already rejected one alternative because we felt it didn't meet Larry's needs, but we have another alternative and we are waiting for an opening. We will be looking at it very closely to make sure it is best for him. There are many things Larry will never have in life, but he could be more comfortable and placed out of danger. I feel he would have a much more stable existence in the community, and he might be safer. Pennhurst is not the answer.

A42 Exhibit K

I, Leonard Singer, hereby declare, under penality of perjury, that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Date 11/10/80

Leo Singer

AFFIDAVIT OF MARIAN CARANFA

1. My name is Marian Caranfa. I am the mother of George Sorotos Caranfa, one of the original named plaintiffs in Halderman v. Pennhurst. As the District Court found, George was bruised and injured weekly during his seven years, as of 1977, at Pennhurst. Each visit, I found bite marks, scratches, burns, and rashes on him.

2. It is now six years since we filed this lawsuit. Finally, George has benefited. The state and the county created an acceptable community residence and day program and, on August 14, 1980, during a simple, uncomplicated five-minute hearing, the placement was approved by the Hearing Master. This informal hearing was no imposition whatsoever.

3. I did not find the planning process difficult or burdensome. I met with the provider and with others involved in the planning, and we talked it over. We had a big meeting with the Special Master's office, which I really didn't think was necessary because they could have just called me and I would have told them that I approved George's move. I have continued to participate in the planning. On the whole this has gone well, although I feel that the staff from the CLA -- who work with George and best know his day-to-day progress and needs -- should have more of a say. It seems that the County is more in control than the provider.

4. George made the transition from Pennhurst to his new home well. At first, George just went on a couple of short, one hour visits from Pennhurst. I drove him and took him back. Then the visits got longer. The staff from the CLA came and got him a few times. We wanted him to know that he would be seeing both me and them. Then George went on an overnight visit.

A44 Exibit L

5. George has made much progress since his move in August. Since then, he has learned four words: "Anna" (his teacher's name), "goodbye," "eat," and "hi." This is the most he has ever spoken in his life. Before this he would only say, "mum." He is also now learning sign language. George will be eighteen next week and yesterday, for the first time ever, he signalled to me that he had to make a bowel movement. I was so over joyed that I cried. He also will hug and kiss me when I ask him to.

6. George has been very difficult to take places -- he doesn't like crowds, he would throw fits. This past week I took him out to the store and bought him a coat. He still didn't want to stay there for a long time, but we were able to go in and get what we needed. This was a big improvement. George is much better off and happier where he is now, than in Pennhurst.

7. George is doing 100% better in his new home. I no longer find any of the bruises, scratches, bite marks or burns on him that he constantly suffered while at Pennhurst. I feel that this, and his progress in communication, is due to the fact that he receives so much more attention in the community placement than he did at Pennhurst.

I, Marian Caranfa, hereby declare, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Marian Caranfa

Date Nov 11, 1980

I, William Caranfa agree with the above
Nov 11, 1980

AFFIDAVIT OF JOSEPH MICHAEL SOWICZ

1. I am Joseph Michael Sowicz. I am twenty two years old.

2. I lived at Pennhurst about eight years. I've been living at 1918 South 17th Street, in Philadelphia, since August 4th. The residence is run by the United Cerebal Palsy Association. There are three men in my apartment, and two women in the apartment upstairs. There is one staff person who sleeps on the 3rd floor, at night, and one awake staff person at night. During the morning and evening hours there are two staff people here. I'm going to physical therapy two times a week during the day at Moss Rehab. I'm waiting for the day program to be approved.

3. I like living here and meeting new people. Living here you get out more places. We will be going to movies. Once a month I go to a social club called the RAYS.

4. I wanted to leave Pennhurst because I got the feeling they didn't treat you right. Up there, some of the people were rotten -- they didn't let people come up and go as they wanted -- or visitors come.

5. I'm happier to be here.

(Original signed affidavit on following page.)

A 47 Exhibit M

1. I. am Joseph Michael Sowicz. I am 22 years old.

2. I lived at Pennhurst about 8 years. I've been living at 1918 S. 17th St, in Philadelphia since August 4th. The residence is run by the United Cerebral Palsy Association. There are 3 men in my apartment, and 2 women in the apartment upstairs. There is one staff person who sleeps on the 3rd floor, at night, and one awake staff person during the morning and evening hours there are 2 staff people here.

12/2

I'm going to be physical therapy 2x a week during the day, at Moss Rehab. I'm waiting for the day program to be approved

3. I like living here and meeting new people living here from

will be
~~I'd~~
get out more places we're going to move. Once a month I go to a social club called the ~~Clays~~: RAYS.

4. I wanted to leave Pontchartrain because I ~~electric~~ got the feeling they didn't treat you right. Up there. Some of the people were rotten - they didn't put people come up and go on they wanted on visitors comes

5. Isn't happen to be true

I, Joseph Michael Scurto hereby declare, under penalty of perjury, that the ~~foregoing~~ foregoing statements are true and correct to the best of my knowledge, information and belief

11/10/80 [illegible]
witness

A-49

AFFIDAVIT OF TINA SOWICZ

1. My name is Tina Sowicz. I am the sister of Joe Sowicz. He has no other family.

2. Joe is now in a community placement run by the United Cerebal Palsy Association. He is on an extended pre-placement visit from Pennhurst.

3. I believe that Joey should make his own decisions, and I will go along with whatever he decides so long as it is not obviously detrimental or dangerous to him. I told this to the Hearing Master; if Joey wanted to leave Pennhurst, I would go along with that, and that was his decision.

4. I am not sure that the community is better than Pennhurst for everyone. I think that there should be case-by-case, person-by-person determinations of what services are best for each person. There may be some people for whom Pennhurst is better. It should be decided individually.

5. I am not 100% sure that the community is best for Joey. But he will never know if he doesn't try -- I think it should be given a try.

I Tina Sowicz, hereby declare, under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Tina Sowicz

A-50 Exhibit N

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

80-738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

In re Pennhurst Parents-	:	Nos. 79-1404
Staff Association,	:	79-1408
	:	79-1414
Petitioner and Movant	:	79-1415
	:	79-1489

PETITIONERS' PENNHURST STATE SCHOOL AND HOSPITAL, ET AL., PETITIONERS IN NO. 79-1404, MEMORANDUM OF LAW IN SUPPORT OF PETITIONER PENNHURST PARENTS-STAFF ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA OR, IN THE ALTERNATIVE, FOR MODIFICATION OF THIS COURT'S STAY ORDER OF JUNE 30, 1980.

Pennhurst State School and Hospital, et al. ("Commonwealth"), hereby join in the Petition for Writ of Mandamus and Prohibition filed by the Pennhurst Parents-Staff Association insofar as that Petition seeks to bar, pending final review by this Court, the District Court's control of and detailed supervision over Pennsylvania's community placement program. Indeed, that Petition expressly adopts precisely the interpretation of this Court's Order of June 30, 1980 that the Commonwealth urged unsuccessfully upon the District Court. See Petition at 13, n. 9. If that is not the proper interpretation, the Commonwealth joins in Petitioners' alternative prayer for modification to the extent it seeks to end the District Court's direct involvement in the placement process.

However, while joining in the Petition, the Commonwealth wishes to emphasize its current policy supporting the placement of mentally retarded persons into appropriate community-based settings. Further, the Commonwealth wishes to affirm its intent to diligently pursue the implementation of this policy separate and apart from the present orders of the District Court. Thus, the Commonwealth seeks enforcement of this Court's order for reasons different, in some respects, than those asserted by the Association.

In this regard, it is important to note why the Commonwealth did not join in Petitioners' prior application for a stay. The significance of its absence was heavily and properly relied upon by Respondents in opposing its grant. The Commonwealth hoped at that time that the bureaucratic structure created by the District Court would promote and not unduly hinder placement efforts. It also feared that a stay might restrain as well its own placement program.

Neither those hopes nor fears have proven justified. The multi-layered judicial bureaucracy has proven to be a substantial hindrance to Pennsylvania's placement program. Valuable resources--approximately $75,000 per month--that could otherwise be devoted to providing services, are consumed in salaries of the Special Master and Hearing Master. In fact, those monthly salaries could fund placements for a full year for as many as three mentally retarded persons. Equally draining of limited resources are the extensive "voluntariness" hearings held before the Hearing Master at which attendance of high-level Commonwealth staff is often compelled.

Even more significantly, the two Masters' offices necessarily delay and frustrate the Commonwealth's programs. Absent the District Court orders, an appropriate community setting could be identified, consents to placements obtained (from an individual and/or parent/guardian) and the placement made. Now that this process is court-controlled, placement can be made only after approval by the Special Master and a hearing and report by the Hearing Master, which report is then subject to exceptions[1] and responses thereto filed in the District Court. The delay in this overdose of procedure is apparent.

Finally, this court-controlled process has lacked all incentives to control the expenditure of public funds--and it has dramatically failed to do so. Although the District Court previously found that community care was comparatively inexpensive--$17.64 per individual per day in 1976--446 F. Supp. at 1312--the average per diem cost for 15 children recently placed in CLAs under court supervision has been $120.88 per day, ranging from $90.26 to $230.00 per day. See Affidavit of Michael Bennett, attached hereto as Exhibit A. These escalating costs reflect directly the lack of cost controls--or any concern for the public fisc--among the Masters' Offices and the Court. They are directly attributable to the usurpation of Commonwealth authority.

Grant of Petitioners' Motion will permit Pennsylvania to get on with its placement program unhindered by these many obstacles. Indeed, in the interim between this Court's order and the District Court's interpretation of it, Pennsylvania moved quickly to reinstate that program. A meeting with county

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[1] The Commonwealth has filed exceptions in four instances contending that various "orders" issued by the Hearing Master exceed his authority. Other parties have filed exceptions as well. None of these exceptions have ever been ruled upon by the District Court.

officials to organize ongoing placement efforts was scheduled, only to be cancelled in light of the Court's order. See Affidavit of Jennifer Howse, PhD, attached hereto as Exhibit B. Nor need Respondents fear any harm. Even plaintiffs' experts concurred at trial that Pennsylvania's CLA program is among the nation's best. Glenn N.T. 6-51, 6-69; Conley 12-26, 12-38.

It is to permit that program to continue and prosper and to restore full responsibility to the governmental officials to whom it properly belongs, that the Commonwealth joins in the Petition for a Writ of Mandamus and Prohibition.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that a writ of mandamus and prohibition issue to The Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, compelling that court's compliance with this Court's order of June 30, 1980. In the alternative, the Commonwealth requests that this Court stay the district court's order of July 15, 1980, and that the Court modify its previous order of June 30, 1980 to bar, pending final review by this Court, the District Court's control of and detailed supervision over Pennsylvania's community placement program.

Respectfully submitted,

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation

ROBERT B. HOFFMAN
Deputy Attorney General

HARVEY BARTLE, III
Attorney General

Attorneys for Commonwealth

Department of Justice
1641 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF DAUPHIN :

AFFIDAVIT

I, Michael Bennett, being duly sworn in accordance with law, state the following is true and correct to the best of my knowledge, information and belief.

1. I am employed as a Welfare Program Officer by the Pennsylvania Department of Public Welfare and have held that position since January of 1980.

2. My responsibilities in that position include supervising and monitoring the placement of Pennhurst residents to community facilities.

3. In Pennsylvania, community facilities and services are provided by private parties pursuant to contracts entered into with the counties.

4. Since July of 1980, fifteen school-aged children have been moved from Pennhurst into community placements under federal court control and supervision, following hearings before the court-approved Hearing Master.

5. Based on the contracts pursuant to which those community services are being provided, the average daily cost of those placements is $120.88, the least expensive placement

costs $90.26 per day and the most expensive placement costs $230.00 per day.

Michael Bennett

MICHAEL BENNETT
Welfare Program Officer
Pennsylvania Department of
Public Welfare

Sworn to and Subscribed

Before me this 31st day

of October, 1980.

Rosanne M. Sears, Notary Public
My commission Expires Sept. 26, 1983
Harrisburg, PA Dauphin County

Notary Public

My Commission Expires:

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF DAUPHIN :

AFFIDAVIT

I, Jennifer Howse, PhD, being duly sworn in accordance with law, state that the following is true and correct to the best of my knowledge, information and belief.

1. I am Deputy Secretary for Mental Retardation, Pennsylvania Department of Public Welfare and have served in that position since January 14, 1980.

2. I have extensive experience in directing community placement of mentally retarded individuals. I served from 1975-1978 as Executive Director of the court-appointed Review Panel in New York State Association for Retarded Children v. Carey, (the "Willowbrook" case) and from 1978 until January 1980 as Associate Commissioner, New York State Office of Mental Retardation and Developmental Disabilities.

3. Following receipt of the Supreme Court's Order of June 30, 1980, I moved promptly to reinstate Pennsylvania's community placement program outside the aegis of the District Court.

4. By letter of July 8, 1980, sent to mental retardation officials in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties, I organized a meeting for July 17 to plan those future placement activities. A true and correct copy of that letter is attached hereto as Exhibit 1.

EXHIBIT B

5. Upon receipt of Judge Broderick's Order of July 14, 1980, stating that the District Court would continue to control the placement process, that meeting was cancelled.

6. If the Petition for Writ of Mandamus and Prohibition is granted, I will reinstate those efforts.

7. In my opinion, staff of the Department of Public Welfare and county officials are fully capable of implementing appropriate community placements without the direct involvement and control of the District Court.

Jennifer Howse

JENNIFER HOWSE, PhD
Deputy Secretary for Mental Retardation
Pennsylvania Department of Public Welfare

Sworn to and Subscribed
Before me this 31st day
of October, 1980.

Roxanne M. Cross, Notary Public
My Commission Expires Sept. 25, 1982
Harrisburg PA
Dauphin County

Notary Public

My Commission Expires:

The attached letter was sent to the following persons:

Patricia C. Sweigert, Administrator
BUCKS COUNTY DEPT. OF MH/MR
Neshaminy Manor Center
Doylestown, PA 18901

William A. McKendry, Administrator
CHESTER COUNTY MH/MR PROGRAM
24 South New Street
West Chester, PA 19380

P. Paul Burrichter, Administrator
DELAWARE COUNTY MH/MR PROGRAM
280 North Providence Road
Media, PA 19063

Patricia Moir, Acting Administrator
MONTGOMERY COUNTY MH/MR PROGRAM
Montgomery County Courthouse
Swede and Airy Streets
Norristown, PA 19404

Leon Soffer, Ph.D., Administrator
PHILADELPHIA COUNTY OFFICE OF MH/MR
1405 Locust Street, 6th Floor
Philadelphia, PA 19102

EXHIBIT 1

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF MENTAL RETARDATION
JENNIFER L. HOWSE, Ph.D.
DEPUTY SECRETARY

TELEPHONE
AREA CODE 717,

July 8, 1980

In view of the status of the Pennhurst litigation, the Department of Public Welfare, Office of Mental Retardation would like to clarify the Commonwealth's policy and direction for placements. The Commonwealth would like to proceed with all appropriate planning to ensure the development of community resources in the Southeast Region, the timely movement of clients to community living arrangements, and an improved staff ratio at Pennhurst Center. I would like the opportunity to discuss the following issues with you on Thursday, July 17th at 10:00 A.M. at the Philadelphia County Office.

1. Placement of the Pennhurst school-aged clients. The Commonwealth and the counties would proceed with the planning for movement of the school-age children. At least twenty (20) days prior to projected movement of any individual, the county would submit the completed IHP to the Pennhurst Implementation Team, Office of Mental Retardation and to the Office of the Special Master.

Within ten (10) days of receipt of the IHP, the Office of the Special Master shall submit written comments on the IHP to the county and the Pennhurst Implementation Team. If approval is granted by OMR, the county would proceed to notify the resident, parent/guardian and/or the advocate of the projected movement date. If no objections are raised, the county may proceed to move the client. If parental objection occurs, the county would make all attempts to resolve parental concerns and reactivate the movement process.

If, however, after reasonable attempts the county is unable to reverse the parental objection, it would cease placement activities for that client.

The county may then identify another Pennhurst Class member of similar characteristics residing at either Pennhurst, Embreeville, or Woodhaven, who could benefit from the services developed. The county would seek the approval of OMR (Regional Office) to proceed with placement activities for this individual.

An IHP developed for any individual not residing at Pennhurst would be approved by you and forwarded to the OMR Regional Office for approval. If approval is granted by OMR, the county would proceed to notify the resident, parent/guardian, and/or the advocate of the projected movement date.

The counties would proceed to identify sites needed in order to accommodate the school-age children. These are (1) one site for one client in Chester County and (2) six sites for ten clients in Philadelphia County.

The counties would proceed with the development and completion of IHP's. These are (1) ten IHP's in Philadelphia County and (2) one IHP in Montgomery County.

The counties would develop placement projections for the eighteen (18) school-age children with no projected movement date. These are (1) one in Chester County, (2) three in Delaware County, (3) one in Montgomery County and (4) 13 in Philadelphia County.

A modified Notice of Placement, will be forwarded to the county which allows the parents to indicate their approval of the movement or their objections. The county would make all attempts to reverse parental objections by addressing their concerns and attempting resolution of the issues. Where resolution cannot be accomplished, the county would cease the movement process for that client.

2. Future Placement Planning. Staff at Pennhurst Center have begun to identify approximately 65 clients for Request for Proposal (RFP) development in the Southeast Region. This first phase of placement planning will be for CLA development; at least one subsequent round of RFP's will be issued for small ICF/MR development. At the July 17th meeting I would like to share for your review and comment some proposed steps and procedures for identifying and grouping the clients, developing and issuing the RFP's, and monitoring the providers' progress in establishing the new services.

3. IHP Guidelines. As you are aware, the Office of the Special Master met with representatives of the counties and OMR to receive specific comments and feedback on the draft revision of the IHP Guidelines. Based on suggestions made by your representatives at the meeting that each county should develop its own guidelines under your direction, OMR will provide the counties with a list of basic requirements or objectives which at a minimum should be met in IHP planning. I am asking you to direct that your staff develop and submit for OMR approval your IHP guidelines reflecting the staff, timing, and process you support and are prepared to implement to satisfy the basic requirements promulgated by OMR. The Regional Office and the Pennhurst Implementation Team are prepared to provide you any consultation and/or technical assistance the county would like to request to expedite the development of each county's guidelines. I will be prepared to disseminate the requirements, the recommendations for format and the timeframes for development at the July 17th meeting.

The Department of Public Welfare and the counties have a long standing commitment, which pre-dates this litigation, to the development of community services and the movement of institutionalized clients to less restrictive settings. Your continued support and effort to meet our mutual goals is critical. I am looking forward to working through your questions and the details of our placement strategy at our meeting.

Sincerely,

Jennifer L. Howse, Ph.D.

cc: Helen B. O'Bannon
Jonathan Vipond, III, Esquire
Robert Hoffman, Esquire
Allen Warshaw, Esquire
Thomas M. Kittredge, Esquire
Pennhurst Implementation Team
OMR Executive Staff
Russell G. Rice, Jr., Ed.D.
George A. Kopchick, Jr.
Marc Myers, Esquire

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

In re Pennhurst Parents-	:	Nos. 79-1404
Staff Association,	:	79-1408
	:	79-1414
Petitioner and Movant	:	79-1415
	:	79-1489

CERTIFICATE OF SERVICE

I, Allen C. Warshaw, Deputy Attorney General, Chief, Civil Litigation, hereby certify that on October 31, 1980, I caused to be served the foregoing Petitioners' Pennhurst State School and Hospital, et al., Petitioners in No. 79-1404, Memorandum of Law in Support of Petitioner Pennhurst Parents-Staff Association's Petition for Writ of Mandamus and Prohibition to the United States District Court for the Eastern District of Pennsylvania or, in the Alternative, for Modification of this Court's Stay Order of June 30, 1980 by first class mail, postage prepaid, upon the following:

David Ferleger, Esquire
37 South Twentieth Street
Suite 601
Philadelphia, PA 19103

Joel Klein, Esquire
Rogovin, Stern & Huge
1730 Rhode Island Avenue, NW
Suite 1100
Washington, DC 20036

Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Tenth and Constitution Avenues
Washington, DC 20530

Joseph Davidson, Esquire
Assistant City Solicitor
Fifteenth Floor
Municipal Services Building
Philadelphia, PA 19107

Thomas K. Gilhool, Esquire
Public Interest Law Center of Philadelphia
1315 Walnut Street
Philadelphia, PA 19106

Thomas M. Kittredge, Esquire
Morgan, Lewis & Bockius
123 South Broad Street
Philadelphia, PA 19109

Frank D. Allen, Esquire
United States Department of Justice
Civil Rights Division
Washington, DC 20530

Allen C. Warshaw

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation

80-738

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SUPREME COURT, U.S.

NOV 14 PAGE 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. A-1134

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,	:	
Petitioners	:	
v.	:	
TERRI LEE HALDERMAN, et al.	:	NOS. 79-1404
	:	79-1408
and	:	79-1414
	:	79-1415
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al.	:	79-1489
	:	

and

UNITED STATES OF AMERICA

Respondents

Response of PARC et al In Opposition To Motion
Of Pennhurst Association For Accelerated
Consideration of Petition For Mandamus and Prohibition
And Cross-Motion of PARC et al To Vacate The Partial Stay

THOMAS K. GILHOOL
FRANK J. LASKI

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107
(215) 735-7200

Counsel for Respondents and
Cross-Petitioners PARC et al.

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EXHIBITS

A. Certified Docket, U.S. Court of Appeals for The Third Circuit, Case No. 80-2341

B. Letters transmitting exceptions in G.W. and P.T. hearings.

C. Response of the Pennsylvania Association For Retarded Citizens, et al., To Application For Stay.

D. Commonwealth Defendants' Brief Regarding Implementation of Stay.

E. Letter of Jennifer Howse of August 19, 1980.

F. Letter of Jennifer Howse of October 8, 1980.

G. Cost Comparisons for Pennsylvania Mental Retardation Institutions, from Office of Mental Retardation Five Year Plan.

H. Primary Mental Retardation Community Services Allocations for FY 1980-81.

I. Pennhurst Study: Brief Report #1. "Developments of Seventeen Former Pennhurst Residents Who Are Now In Community Living Arrangements in Montgomery County."

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Miscellaneous:

Stern & Gressman, Supreme Court Practice, 5th Ed. 1978	1, 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. A-1134

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,		
Petitioners	NOS.	79-1404, 79-1408, 79-1414, 79-1415, 79-1489
v.		
TERRI LEE HALDERMAN, et al.,		
UNITED STATES OF AMERICA, and		
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al.,		
Respondents		

Response of PARC et al In Opposition To Motion Of Pennhurst Association For Accelerated Consideration Of Petition For Mandamus and Prohibition * And Cross-Motion of PARC et al To Vacate The Partial Stay

The Pennsylvania Association for Retarded Citizens and four individual retarded people by their next friend and relative, who are representatives of the class of plaintiffs below, respondents in Nos. 79-1404, 79-1408, 79-1415 and 79-1489, and cross petitioners

* Contrary to Rule 33(1) of the Court, the Pennhurst Association has not filed a Motion for Leave to File a Petition for Writ, but has filed a petition itself. On that ground alone, the petition should be dismissed. Stern & Gressman, Supreme Court Practice 647-48 (5th ed. 1978). And see Deen v. Hickman, 358 U.S. 57 (1958); Stern & Gressman at 632.

[Footnote Continues]

in No. 79-1414 now pending argument before the Court, briefs of all parties on ther merits having been submitted, oppose the Motion for Accelerated Consideration of a Petition for Writ of Mandamus and Prohibition, on the following grounds:

1. The matters as to which petitioners seek an Extraordinary Writ from this Court are pending before the district court upon exceptions and before the Court of Appeals upon appeal having been brought to those proper forums by petitioners Pennhurst Association and Commowealth themselves and where the full record and not the selective portions advanced here by petitioners are before the Court; thus a Extraordinary Writ does not lie here at all let alone a need for accelerated consideration. A certified copy of the docket entries in the Commonwealth's appeal from the district court's Order of July 14, 1980 is attached as Exhibit "A"; copies of letters transmitting the Pennhurst Association's exceptions to the district court from the decisions in G.W. and P.T. are attached as Exhibit "B".

2. The district court's implementation of the partial stay is entirely consonant with the June 30, 1980 Order of this Court; petitioners claims to the contrary are based upon a misreading of the

---

Further, Snider v. All State Administrators, Inc., 414 U.S. 771 (1974), announces that Motions for Leave and Petitions for Writ will not be accepted for filing unless printed, except in in forma pauperis circumstances and then the in forma pauperis motion will be acted upon before a Petition for Writ can be filed, Stern & Gressman at 647.

No showing of in forma pauperis status is attempted in the Pennhurst Association's Motion to Dispense with Printing. The only reason adduced there for failure to print is that printing would "unduly delay this Court's resolution of this Matter." The time of filing is and has been entirely in the control of the Pennhurst Association and the Commonwealth, who could have filed a Motion for Leave to File a Petition for Writ in this Court at least any time since October 15, 1980 (the date of the objected to determination in re G.W.) or October 8, 1980 (the date, in re P.T.), including October 20 and October 27 the dates upon which counsel for the Pennhurst Association did file exceptions in the district court from the G.W. and P.T. determinations.

stay papers which were before the Court when it granted a partial stay and "in all other respects...denied" the original stay request.

3. Pennhurst Association and Commonwealth Petitioners' application in the alternative for a further and augmented stay--which would in effect reopen and reverse the Court's decision to refuse the blanket stay sought originally from this Court--is based upon misrepresentations as to the facts below and would, if granted, leave plaintiffs without protections both courts below and this Court have found necessary to avoid irreparable harm to plaintiffs pending ultimate decision by this Court of the case in chief, in that:

(a) Commonwealth intends to move the rest of the school-age children and 65 adults now at Pennhurst within the 1980-81 fiscal year;

(b) Commonwealth defendants resistance to the orders of the court below show they would move such plaintiffs without regard for parental participation, without mediation of parental concerns, without training and monitoring of community programs, without formulation of individual program plans in accord with professional standards, without regard to whether programs are appropriate or not and with no opportunity, provided now by presence of court orders and masters for the counties or plaintiffs, to hold the Commonwealth to professional standards;*

4. Rather than grant the further all-encompassing further stay sought by petitioners Pennhurst Association and Commonwealth, the Court should grant the Cross Motion of PARC et al to Vacate the Partial Stay, on grounds that:

(a) the district court and the Court of Appeals en banc, unanimously, have heretofore denied in their entirety stays of the orders below;

---

* The five defendant counties have generally cooperated in the implementation of the Hearing Master's determinations below and have not joined in the Petition for Writ or in the Alternative for Modification of Stay.

(b) The merits of the underlying case have now been fully briefed in this Court and it becomes clear that respondents will likely prevail;

(c) Continued subjection of any member of plaintiff class to conditions of Pennhurst for any reason continues to visit upon them risk and actuality of injury (35a) and regression (20a) and medical abuse and to deprive them of opportunities for growth presented by community living arrangements.

In support of their response PARC et al say in particular as follows:

I. The Pennhurst Association and Commonwealth's Petition for Extraordinary Writ Does Not Lie Here Nor Is It Ripe Because They Have, And Have Pursued, Alternative Legal Remedies

1. The matters concerning particular individuals, G.W. and P.T., of which the Pennhurst Association complains are pending before the district court, the Honorable Raymond J. Broderick, having been put before the district court by counsel for the very Pennhurst Association on October 27, 1980 and October 20, 1980, respectively, pursuant to the procedures established by the district court for exceptions to determinations by the hearing master. See letters transmitting exceptions, appended as Exhibit "B". The record of those hearings is before the district court, but has not been placed before this Court. During the pendency of these exceptions G.W. and P.T. remain at Pennhurst.*

* Of the 20 hearings held and the 19 determinations made by the Hearing Master since the district court's July 14, 1980 Orders (not 17 determinations as incorrectly stated in the Petition at(p. 5 and in Pennhurst Association counsel's Affidavit), exceptions have been filed on behalf of parents or retarded persons only in G.W. and P.T. In the 17 other instances the retarded person and his nearest relative agreed that movement from Pennhurst to the community initiated by the Commonwealth was proper and desired in the retarded person's interest.

2. The Commonwealth of Pennsylvania, the party primarily interested in the effort to secure from this Court a further more encompassing stay, denied by the Court on June 30, 1980, which would dissolve the protections established by the district court for the benefit of plaintiff retarded people (See Commonwealth's Memorandum of Law in Support of Petition for Writ of Mandamus and Prohibition or, in the Alternative, for Modification of Stay, dated October 31, 1980), has by its appeal of the district court Order of July 14, 1980, filed September 23, 1980, placed all matters concerning that order before the Court of Appeals for the Third Circuit where they are now pending on the full record of the proceedings in the district court no part of which has been put before this Court by petitioners. See certified copy of docket entries in Appeal No. 80-2341, appended as Exhibit "A".*

3. Petitioners here thus have other remedies at law; they have in fact invoked those remedies; those proceedings are pending before the district court and the Court of Appeals; the interests petitioners assert here are fully protected in those proceedings. In these circumstances, no extraordinary writ lies, nor should a writ issue, nor and, had petitioners requested leave to file a petition for extraordinary writ, should such leave issue. Kerr v. United States District Court for the Northern District of California, 426 U.S. 402, 403 (1976). There is no reason for accelerated consideration of Petitioners' Extraordinary Writ.

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* On October 31, 1980, the Commonwealth purported to file in the Court of Appeals a motion to extend time for breifing its appeal until ten days after this Court should rule upon the then not-yet-filed Pennhurst Association's Petition for Extraordinary Writ. The Commonwealth motion has not been docketted or acted upon by the Court of Appeals.

II. The District Court's Implementation of The Partial Stay Is Fully Consonant With The June 30, 1980 Order of this Court

4. On June 30, 1980, this Court entered the following Order:

> "Petitioners' motion for a stay of the judgment of the Court of Appeals pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.' In all other respects, the motion is denied. Mr. Justice Brennan, Mr. Justice Marshall, Mr. Justice Blackman and Mr. Justice Powell would deny the motion." 100 S. Ct. 3046 (1980).

5. In its Opinion concerning its Order of July 14, 1980 implementing this Court's partial stay, the district court, the Honorable Raymond J. Broderick, wrote:

> "the Supreme Court granted a stay of the judgment of the Court of Appeals only "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.'" We understand the word "mandate" to have its literal meaning -- that this Court cannot mandate the movement of residents from Pennhurst to the community. Nothing in the Supreme Court stay order suggests, however, that voluntary transfers may not proceed, nor that this Court may not ensure that residents and their families make informed judgment as to such voluntary placements. Furthermore, we find nothing in the Supreme Court stay order to prevent this Court, with the assistance of its Special Master and Hearing Master, from ensuring that such voluntary transfers make adequate provision for the safety and habilitation of the retarded residents." Opinion of July 28, 1980, appended to Petition for Writ as Appendix B, pp. 4-5.

6. The district court's construction of the Court's partial stay order was correct, as clearly appears from what was before the Court upon the Pennhurst Association's original stay motion as follows:

(a) The Pennhurst Association's focal complaint in its original stay motion was: "Absent this Court's intervention, a substantial number of retarded individuals will be forced into com-

munity living arrangements that are not equipped to care for them before the case is resolved in the 1980 term." Memorandum of Pennhurst Association on Stay Motion, p. 13, reiterated in its Petition for Writ at p. 4 (emphasis supplied)

(b) In their original stay motion, Pennhurst Association sought but this Court apparently denied:

(i) a stay of paragraphs 1-11 of the Order of March 17, 1978, in their entirety (these orders require a supply of community services individual program plans formulated with parental participation, monitoring and training by defendants);

(ii) a stay of paragraphs 12-20 of the Order of March 17, 1978 (standards for the interim operation of Pennhurst) insofar as they require or depend on the Special Master;

(iii) a stay for the Order of March 5, 1979 (mechanisms for oversight of interim operation of Pennhurst and case management in community services) insofar as they require or depend on the Special Master;

(iv) a stay of the Order of June 8, 1979 in its entirety (requiring a supply of community services for all school-aged children at Pennhurst, monitoring and training by defendants and quarterly advanced allocations by state or counties)

(v) a stay of Section V of the April 24, 1980 Orders in its entirety (providing for the individual determinations required by the Court of Appeals)

(vi) a stay of all future orders of the district court insofar as they relate to the transfers of people from Pennhurst and/or to the utilization of the Special Master, including but not limited to the District Court's Proposed Order of May 20, 1980 (which would have required a supply of community services for 250 Pennhurst residents by June 30, 1981, including vocational, medical-dental, supportive services, monitoring and training).

(c) Instead, the Court by its orders of June 30, 1980 granted a partial stay of the orders below insofar as they mandate the transfers of people from Pennhurst.

(d) Respondents PARC et al and Halderman et al in their responses to Pennhurst Association original blanket stay motion had

placed before this Court the fact that Commonwealth defendants in all events intended to transfer some 300 people from Pennhurst to community living arrangements during fiscal years 1980-82 and that the protections of the district court's orders were in all events required to assure plaintiffs would not be harmed by Commonwealth in so doing. See Response of PARC et al to Application for Stay, pp. 4-5, filed in the Court June 24, 1980 and appended here as Exhibit "C". Apparently this fact, that the Commonwealth would be transferring Pennhurst residents to community living arrangements in all events, contributed to the Courts formulation of its partial stay prohibiting court-mandated-movement, but letting the protections of the district court orders stand.

7. Following this Court's June 30, 1980 partial stay, the Commonwealth argued to the district court that all orders of the district court in any way related to community living arrangements and other community services had been stayed and the Commonwealth could proceed in untramelled fashion to place Pennhurst residents in the community, as and how it wished, despite the trial record of ten years derelictions by defendants found by the district court and the Court of Appeals en banc. The Commonwealth argued:

> "The Supreme Court acted broadly to enjoin the Court's control and supervision, pending final disposition, over the process of deinstitutionalization."
>
> "In short, the stay is directly, squarely and broadly aimed at this Court's authority to mandate and control the process of community placement. The Court may neither direct placement nor control its form and process. The only portions of the April 24, 1980 [previously denoninated March 17, 1978 and March 5, 1979 Orders] surviving the stay are:
>
> a. Part I [i.e. March 17, 1978 Orders] paragraphs 11-19 regarding Pennhurst, paragraphs 5,7-8, regrading the Master insofar as related to Pennhurst activities and paragraph 20; and

b. Part II,[March 5, 1979 Order], paragraphs 1.0 - 6.0.*

"This does not mean the placement process will grind to a halt....Rather it will move ahead under the [sole] jurisdiction of Commonwealth and county officials." Commonwealth Defendants Brief Regarding Implementation of Stay at 1,3, appended as Exhibit "D" (brackets and emphasis supplied).**

Plainly, given the reach of the original blanket stay motion, the Court's grant of only a partial stay "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements'", and the Court's denial of the blanket stay motion "in all other respects" the construction of the Court's stay which the Commonwealth urged upon the district court was incorrect. Conversely the district court's interpretation and its implementation of the stay is correct and faithful.*** Yet the Commonwealth again seeks by the Pennhurst Association's Petition for Writ or in the Alternative for Modification of Stay to secure exactly the stay this Court has once denied.

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* These Orders relate to in-institution protections.

** The Pennhurst Association now adopts this position of the Commonwealth, see their Petition p. 13 n. 9, and urges that the Commonwealth remains free to transfer Pennhurst residents if, and howsoever, in the Commonwealth's independent view, it considers transfer to be appropriate--a position which reveals the interest represented by the Pennhurst Association Parent-Staff to be rather more a staff or union interest rather than any parental interest. Only the district court Orders (para,2) assure a parental role in the formulation of program plans for retarded people; the record shows parents had been uniformly excluded from participation in planning and placement decision (446 F. Supp. at 1313, Joint Appendix 740a 697a). See also October 1, 1980 Master's Report, Table XI at p.23 showing 61.5% participation by family members in program planning under the Court's oversight as against 11.3% participation previously.

*** Pennhurst Association's assertion (Petion for Writ at p. 10 n6) that the district court in its Opinion in chief in this case had "expressed the view that, due to mental disabilities of many Pennhurst residents, 'the notion of voluntariness in connection with admission as well as in connection with the right to leave Pennhurst is an illusory concept'" is a corruption of what in fact the district court said. The district court's opinion shows, 446 F. Supp. at 1311, 59a - that the court found "voluntariness" an illusory concept" not because of residents' disabilities but because the record in this case shows that Pennhurst residents had no practical alternative at the time of their admission and at the present time;they have no place else to go.

III. The Further Encompassing Stay sought by the Commonwealth and the Pennhurst Association would leave transfer of Pennhurst residents to be transferred to Community living arrangements without the protections, the trial record, findings of court and continuing experience shows to be necessary to avoid dumping and their irreparable harm.

8. Without regard to any Court order, the Commonwealth intends transfer 31 additional school-aged residents* of Pennhurst and 65 adult Pennhurst residents to community living arrangements between now and June 30, 1981. The Commonwealth's undertaking to transfer the rest of the school-aged residents and 65 additional adults is reflected in Commonwealth Allocations to Counties, August, 1980 and letters of August 19, 1980 and October 8, 1980 from Pennsylvania DPW Deputy Secretary Howse to County Administrators appended as

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* When the Commonwealth sought a Stay of the school-aged order of June 8, 1979 from the Court of Appeals pending en banc argument, the Pennsylvania Department of Public Welfare Secretary announced the Commonwealth would, even without a court order, place the 65 school-age children in the community by September, 1979.

Today, despite this Commonwealth pledge and despite the continuing effect of the June 8 Order, requiring placement by September 1979 and its later amendment requiring placement by June 30, 1980, the Commonwealth has still not placed 31 of the school-aged children.

Exhibit "E" and Exhibit "F".*

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* Deputy Secretary Howse's letter of August 19, 1980 recites:

> "As you are aware, I elected to cancel our meeting originally scheduled for July 17, 1980 in light of the issuance of new court orders on July 14, 1980. I would like to reschedule that meeting on Thursday, August 28, 1980 at 10:00 A.M. at the Philadelphia County MH/MR Office."
>
> "At that time, I will outline my recommended direction regarding placement of plaintiff class members."

The Deputy Secretary's statement in her Affidavit of October 31, submitted to the Court as Exhibit B of the Commonwealth's Memorandum of Law in Support of Petition for Writ of Mandamaus and Prohibition, that

> "Following receipt of the Supreme Court's Order of June 30, 1980, I moved promptly to reinstate Pennsylvania's community placement program outside the aegis of the District Court."
>
> "By letter of July 8, 1980, sent to mental retardation officials in Bucks, Chester, Delaware, Montgomery and Philadelphia counties, I organized a meeting for July 17 to plan those future placement activities. A true and correct copy of that letter is attached hereto as Exhibit 1."
>
> "Upon receipt of Judge Broderick's Order of July 14, 1980, stating that the District Court would continue to control the placement process, that meeting was cancelled."
>
> "If the petition for Writ of Mandamus and Prohibition is granted, I will reinstate those efforts."

The affidavit promise to "reinstate' their community placement efforts and Commonwealth's Memorandum here are but the most recent instance of Commonwealth defendants recurrent posturing throughtout this action. The Commonwealth's pattern throughtout and now has been to seek to avoid court orders by reciting their intention to do it on their own, but then to fail to do so (See, e.g., the findings 446 F. Supp. at 1311 and 1325; 48a and 78 a). When under court order, the Commonwealth has delayed and resisted (e.g., their non-performance under the Children's Order of June 8, 1979), incredibly attributing their non-performance to the court order itself. Upon each succeeding application for stay (compare application in re Children's Order, and their Brief Regarding Implementation of Stay, Exhibit "D", at pp.4-5) the Commonwealth again represents they will do it if only a stay is granted.

9. The district court's orders do not impose a "massive bureaucracy" upon defendants. Nor do those orders displace defendants; they nominate who shall be transferred, they develop the individual program plans, they invoke and assure parental participation, they design and develop the community programs, they determine their costs* See Orders of April 24, 1980, passim. The Master's role is oversight, a check to ascertain that defendants do these things and do them in accordance with professional standards. Judge Broderick's orders, and the Master's oversight, do not remove or transfer any responsibility of the state or counties, but rather sharpen and focus state and county responsibility and make clear and sure they are theirs, responsibilities long since assigned to them by state and federal statutes but as the trial record showed, responsiblities ignored, blunted, blurred and confused by county and state conduct through

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* Commonwealth's effort through the affidavit of Michael Bennett (See Memorandum at p. 3) to attack collaterally the finding of the district court, in which the Court of Appeals concurred and which petitioners have not raised on certiorari, that community services are on the average less costly than Pennhurst misses the mark. The affidavit does not disclose that average per capita costs at Pennhurst are now $134.00 per person per day. See "Cost Comparisons", 1980-81, All Pennsylvania Retardation Institutions, in Commonwealth of Pennsylvania, Mental Retardation Facilities: Five Year Plan, Vol.I (March 1, 1980) appended hereto as Exhibit "G ". Nor does the affidavit disclose that the average cost of the 15 community placements which the affidavit purports to present does not factor what those costs will be upon full occupancy of those CLA programs. For example, G.C., one of the fifteen, is the only person now in a CLA designed and staffed for 3 persons. (See Hearing Decision in re G.C. August 21, 1980, at p. 2). When fully occupied, a decision within the authority of defendants, G.C.'s CLA would cost, not an average of $120.88 per person per day, but much less.

more than a decade and now.*

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* Contrary to Deputy Secretary Howse's affidavit that the "District Court would continue to control the placement process" (para. 5), all orders of the Court put that process under the control of defendants. The Commonwealth's responsibilities as assigned in the April 24, 1980 Order of the district court in particular example are:

- to provide suitable community living arrangements for retarded residents of Pennhurst. I (1).
- to provide to each resident of Pennhurst a written individualized program plan and individualized habilitation program I (2).
- to provide monitoring mechanisms I (3).
- to provide continuing support and assistance to Pennhurst residents as they move into community programs II (7.1.1)
- to support case managers for Pennhurst residents II (7.1.2).
- to provide pre-service and in-service training for personnel providing community services for school-aged persons placed in the community IV (5).
- to provide program and fiscal monitoring mechanisms for all community programs established for Pennhurst residents of school age IV (10).
- to project costs of community services for Pennhurst residents of school age and make quarterly payments to the counties IV (12). (See e.g. Commonwealth allocations appended as Exhibit H).

The Special Master's role is limited to oversight (See e.g. IV. (5), for Master's "review and approval" of proposal for mandatory pre-service and inservice training"; IV. (8) Master's review of plans for non-residential services; IV. (10), Master's review and approval of Commonwealth monitoring plans.

The Commonwealth's assertion that current Court of Appeals ordered hearing mechanisms are "a substantial hindrance to Pennsylvania placement program" (Commonwealth Memo. p.2) is contrary to

[Footnote Continues]

10. Without the protections of the district court's order the record of trial and since shows plaintiffs will be subjected to great harm: both by being forced to remain at the institution and from improperly planned and implemented transfers to community living arrangements as follows:

(a) on the one hand, dependent soley upon defendants' continuingly "vague and indefinite schedule" (78 a), people are left at Pennhurst longer than they would choose to be there and suffer the continuing injury and regression of their skills which Pennhurst imposes.**

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* [Footnote Continues]

Deputy Secretary Howse's testimony that,

> "We feel some discomfort in proceeding with the move of a client in the absence of at least having that check and balance of a a hearing process in the absence of a specific response from the parent." (Hearing March 6, 1980 Tr. 52).

** Forty people have died at Pennhurst since the Orders of March 17, 1980. A Report commissioned by the Special Master on these deaths by two physicians, filed with the district court on July 15,1978, concluded, for example:

> "In literally all of the records reviewed, of Pennhurst residents both living and deceased ..., documentation of the process of medical diagnosis and treatment is scandalously poor" (page 4)
>
> "In many instances, in the records of deceased residents..., signs of problems were present long enough before the terminal event, that if heeded and acted upon could prevent death or mitigate the threat of serious accident or disease" (page 3)
>
> "Viewed in terms of traditional medical care, Pennhurst residents do not receive periodic comprehensive assessment of their condition, their progress and their long and short term, medical needs. This leads, for example, to rote reordering of, and exposure to side effects of, drugs for which the original need has long since become obscure; inattentive seizure management; failure to evaluate life-threatening conditions which may be highly treatable; and failure to take effective action to eliminate known life-threatening behavior." (page 11).

A new medical director for Pennhurst appointed by the Commonwealth in late August, quit in Mid-September.

(b) On the other hand, transfer to community living arrangements without the court-ordered protections the Commonwealth and the Pennhurst Association now again seek to stay subjects Pennhurst residents to dumping, for example: being moved where openings are available without regard to whether the placement provides the structure and services required by the person, without consideration of parental insights and programming desires, without formulation or effectuation of individual program plans which secure the first two protections,without pre-services and in-service training of providers and without monitoring. See, e.g. the October 1, 1980 Master's Report p.11, lodged by Halderman et al. in their response herein (the first forty people to be moved from Pennhurst, after the Order of March 17, 1978 and before the Special Master was appointed, were moved without an individual program plan, despite paragraph 2 of the Order of the Court); Hearing Master Opinions in re J.S., E.M., S.P., and N.T. (noting, and correcting in the course of the review process, omissions by defendants in consultation and mediation with parents, in training, staffing, or monitoring, in arrangement of day program, medical or dental services).*

11. With the protections accorded by the outstanding orders of the district court to retarded people during their transfer the outstanding, protections which the Commonwealth and the Pennhurst Association now seek to stay entirely, the detriment of Pennhurst has been eliminated for those transferred and they have gained from properly planned community services, as follows:

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* Such protections do not require a formal individual hearing as the Court of Appeals ordered, but may be realized by a Master's informal review of the state and county placement plans and processes, (until such time as those processes themselves may be relied upon) as the district courts original orders contemplated. See Brief of Respondents PARC et al (filed October 20, 1980), pp. 32-33 n.46.

(a) For example, the 17 people transfered from Pennhurst to community living arrangements in Montgomery County are no longer subject to the regression Pennhurst imposes (20a) and have instead learned and mastered significant new skills in their community living arrangement. These seventeen have gained 16.2 points on the average (on a base of 56.2 points) on a Behavior Development Survey Scale measuring skills in personal self-sufficiency, community self-sufficiency and personal-social responsibility. The Pennhurst Study: Brief Report #1 (October 16, 1980) (Conroy et al) (prepared under contract to the Secretary of HEW, in the course of a five year evaluation of Pennhurst implementation) is appended hereto as Exhibit "I". See also October 1, 1980 Master's Report at pp. 14-23 (reporting Individual Growth of the 122 people transferred under protection of the Court's Orders and the Affidavit of former Pennhurst residents now in CLAs and their parents appended to the response of Halderman et al. herein.

(b) Parental involvement both in program for their relative and in visitation and activities with their relative is dramatically increased in community living arrangements. See October 1, 1980 Master's Report pp. 20-23, lodged with the Court by Halderman et al. in their response herein. 61.5% of the parents or next closest relatives of retarded persons in the community have participated in planning the person's program; whereas only 11.3% had participated when the person was at Pennhurst. Table XI, p. 23. Forty-two percent have had family visits at least monthly in the CLAs, whereas only 14.2% had monthly visits from their family at Pennhurst. Forty-percent have visited or taken a trip with their family from the CLAs, whereas only 3.4% had done so from Pennhurst. Table X, p. 22. See also the affidavits of Pennhurst residents now in CLAs and thier parents appended to the response of Halderman et al herein.

(c) Under protection of the district court's orders the community programs provide the active services needed by the 122 retarded people transferred thus far (October 1, 1980 Master's Report, pp. 24-33); their residential and day programs are monitored by county case managers monthly (Table XIII, p.36); the community residents each have a doctor and a dentist (Table XII, p. 25).

IV. Cross-Motion of Respondents' PARC et al Vacate The Partial Stay

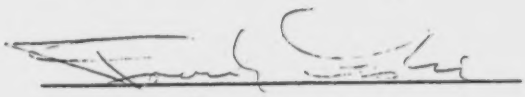
Respondents PARC et al respectfully move that the Court vacate the partial stay entered June 30, 1980, on the following grounds:

(a) The Courts below, including the Court of Appeals en banc, unanimously, on May 12, 1980 -- have denied stays in their entirety. This Court on October 1, 1979 unanimously denied a stay while the case was pending decision in the Court of Appeals. 100 S. Ct. 28 (1979).

(b) The merits of the questions as to which the Court granted certiorari in Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489 have now been briefed by all parties and, respondents submit, it is now clear that petitioners are not likely to prevail on the merits.

(c) Continued injury and regression during any further time at Pennhurst for whatever reason and the deprivation to Pennhurst residents of the benefits of community living imposes upon Pennhurst residents a harm far outweighing any harm to defendants from a dissolution of the partial stay. See the Reproduction of U.S. Ex. 48, lodged with the Court and the briefs of all parties. If the partial stay is dissolved, the district court ordered protections during transfer, of course, would remain but the district

court would be free to order a reasonably-paced provisions of community living arrangements for those residents for whom they would have the benefit of such a reasonably-paced schedule rather than awaiting their place on the Commonwealth's "vague and indefinite schedule", 78 a, to transfer them to the community.



Thomas K. Gilhool
Frank J. Laski

PUBLIC INTEREST LAW CENTER OF
PHILADELPHIA

1315 Walnut Street, Suite 1600
Philadelphia, Pennsylvania 19107
(215) 735-7200

Counsel for Respondents and
Cross-Petitions PARC et al

November 12, 1980

Exhibit "A"

[illegible] 79-1628, 79-1630, 79-1842, 79-2092/3 & 80-1827

80-2341
"Commonwealth" Defendants Helen O'Bannon, et al

Form A. O. 147 (July 1963)

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

APPEAL FROM	CASE NO.
EASTERN DISTRICT OF PENNSYLVANIA	80-2341

TITLE OF CASE	ATTORNEYS FOR APPELLANT
(SEE PRECEDING PAGE FOR COMPLETE CAPTION) TERRI LEE HALDERMAN, et al. vs. PENNHURST STATE SCHOOL & HOSPITAL, et al. "Commonwealth" Defendants, Helen O'Bannon, Jennifer Howse, George Kopchick, et al., Appellants.	Robert B. Hoffman - Member **ATTORNEYS FOR APPELLEE** Alexander Ewing, Jr. [U.S.A.] David Ferleger - Member [Terri Lee Halderman, et al.]

Old covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 1467, 79-1628, 79-1630, 79-1842, 79-2092/3, 80-1827&80-2341

NO. BELOW: D. C. Civil No. 74-01345

JUDGE BELOW: Raymond J. Broderick

DATE OF JUDGMENT:

NOTICE OF APPEAL FILED: August 13, 1980

Commenced in D.C. May 30, 1974

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
1980 Sept. 23	Appeal docketed in C.C.A. Clerk's fees pd in D.C.			

80-2341

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

THIRD CIRCUIT

CASE NO. 80-2341

DATE 1980	FILINGS—PROCEEDINGS	Filed
Sept. 23	Certified copy of Notice of Appeal received August 15, 1980, filed.	
	Record received May 1, 1978, filed. (Papers Nos. 36, 137/138, 245/260, 315, 378, 391/92, & 478/480 not included)(ENTIRE RECORD IN EXHIBIT ROOM - 5 boxes) (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092/3, 80-1827 & 80-2341)	
	First supplemental record (Docs, 481/489), received July 18, 1978, filed. (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Second supplemental record (Docs. 490/497, 503, 506/518), received November 17, 1978, filed. (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Third supplemental record (Docs. 519/535), received January 4, 1979, filed. (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Fourth supplemental record (Docs. 537, 541/43, 545, 547/48, 551/558, & 562/564), received April 5, 1979, filed. (Covers 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Fifth supplemental record (Docs. 560, 590/96, & 600/608), received June 13, 1979, filed. (Covers 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Sixth supplemental record (Docs. 561, 568, 571/72, 599, 611/13, 617, & 620/23), received July 11, 1979, filed. (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Seventh supplemental record (Docs. 478/9, 498/502, 504/5, 537, 541/46, 549/50, 559/70, 573/89, 594, 597/98, 605/6, 609/10, 618/19, 624/34, 636/642, 645/48, 650/54, 662, 664/68, 670/686, 688/690, 692/3, 695/704, 706/10, 712/19, 723/29, 733/35, 742/46, 748, 750/52, 757, 760,762, 771, 775, 777/78, 780/85), filed. (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
	Eighth supplemental record (Nos. 649, 655, 658, 711, 730, 732, 736, 738, 753, 756, 758/9, 763/6, 768, 770, 774, 791, 793/4, 796/807, 813/16, 818/20, 824/30, 833/37, 839/47, 849, 851, 853, 855/6, 858, 862/3, 865/68 & 870), filed. (Covers Nos. 78-1490, 78-1564, 78-1602, 78-1999, 79-1467, 79-1628, 79-1630, 79-1842, 79-2092, 79-2093, 80-1827 & 80-2341)	
Sept. 26	Appearance of Alexander Ewing, Jr., Esq., for appellee, United States of America, filed.	
Oct. 9	Appearance of Robert B. Hoffman, Esq., for appellants, filed.	
Oct. 22	Appearance of David Ferleger, Esq., for appellees, Terri Lee Halderman, et al., filed.	

A TRUE COPY:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk

Exhibit "B"

PILCOP

OCT 21 1980

LAW OFFICES OF
SWENSON & COHEN
SUITE 1500
275 SOUTH 10TH STREET
PHILADELPHIA, PA. 19103

(215) 735-3710

SANDRA SWENSON, Esquire
PAMELA PRYOR COHEN, Esquire

October 20, 1980

Clerk of the Court
U. S. District Court, Rm. 2609
United States Courthouse
601 Market St.
Phila., Pa. 19106

Re: Halderman v. Pennhurst
No. 74-1345

Dear Sir:

In accordance with the trial court's Order of July 14, 1980, enclosed for filing please find Exception to the Report of the Hearing Master in re proposed community placement of P.T.

Thank you.

Sincerely,

Pamela Cohen

PAMELA P. COHEN

PPC:lb
cc: P.T.
Mr. and Mrs. F.T.
Penelope Boyd, Esq.
Michael S. Lottman, Esq.
Carla S. Morgan
Dorothy J. Rowe
Dr. Russell Rice
P. Paul Burrichter
Patricia Jenkins, Esq.
Counsel for Plaintiffs & Intervenors
Robert Hoffman, Esq.
George Kopchick

LAW OFFICES OF
SWENSON & COHEN
SUITE 1500
275 SOUTH 19TH STREET
PHILADELPHIA, PA. 19103

SANDRA SWENSON, Esquire
PAMELA PRYOR COHEN, Esquire

(215) 735-8710

October 27, 1980

Clerk of the Court
U. S. District Court, Rm. 2609
United States Courthouse
601 Market St.
Phila., Pa. 19106

Re: Halderman v. Pennhurst
No. 74-1345

Dear Sir:

In accordance with the trial court's Order of July 14, 1980, enclosed for filing please find Exceptions to the Report of the Hearing Master in re proposed community placement of G. W.

Thank you.

Sincerely,

PAMELA P. COHEN

PPC:lb
cc: G. W.
Mr. R. W. and Mrs. C. Y.
David Ferleger, Esq.
Michael S. Lottman, Esq.
Carla S. Morgan
Dorothy J. Rowe
Dr. Russell Rice
Wm. McKendry
Counsel for Plaintiffs & Intervenors
Robert Hoffman, Esq.
George Kopchick

Exhibit "C"

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. A-1134

PENNHURST STATE SCHOOL AND HOSPITAL,	:	
SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, et al.,	:	
LOCAL AUTHORITIES OF BUCKS, CHESTER, DELAWARE, MONTGOMERY AND PHILADELPHIA COUNTIES, and	:	NOS. 79-1404
PENNHURST PARENTS-STAFF ASSOCIATION, INC.	:	79-1408
	:	79-1414
	:	79-1415
Petitioners	:	79-1489
v.	:	
TERRI LEE HALDERMAN, et al.,	:	
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al., and	:	
UNITED STATES OF AMERICA	:	
Respondents	:	

RESPONSE OF THE PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al., TO APPLICATION FOR STAY

The belated Application for Stay by the Pennhurst Parents-Staff Association supported by Suburban Counties* misstates the facts of record in this case as well as the provisions and the purport of the Orders below, contradicts the Pennhurst Association's own averments below, addresses on the merits only the

* Commonwealth of Pennsylvania petitioners (No. 79-1404) have not joined in or supported this Stay Application. Commonwealth petitioners advise counsel for PARC et al. that they do not intend to do so.

two questions on which this Court had denied certiorari and shows no harm justifying a stay. Rather than maintain the status quo, the partial Stay sought would disrupt an orderly and integrated remedial process, as to which the chief party in interest apart from retarded people themselves, namely the Commonwealth, seeks no Stay.* For these and the following reasons, the Pennsylvania Association for Retarded Citizens et al. (the Association and four individual retarded people representative of the class certified below) submit, the Application for Partial Stay should be denied.

1. The Court of Appeals for the Third Circuit decided this case en banc on December 13, 1979. The Court of Appeals mandate issued on January 4, 1980. Between March 14, 1980 and March 20, 1980, petitions for certiorari were filed by the Commonwealth of Pennsylvania, the City of Philadelphia, four Suburban Counties, and the Pennhurst Association. On June 9, 1980, this Court denied certiorari as to two questions, granted certiorari as to other questions and itself specified one additional question.

Only now, on June 20, 1980--six months after decision below and more than five weeks after its stay request was denied in the Court of Appeals--does the Pennhurst Association seek a Stay in this Court, belying thereby any claim of irreparable injury pending review by the Court.

Applicant's stay request was denied by a unanimous Court of Appeals, on May 12, 1980, the nine members who decided the merits participating en banc. The Court of Appeals which unanimously denied the stay included the three

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* The Orders Applicant seeks to stay are the orders of U.S. District Judge Raymond J. Broderick whose care and caution in these matters has been expressly remarked and approved by this Court in Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640, 645 n. 7 (1979).

judges who had dissented to the Court's en banc Opinion on the merits. *

2. This Court on June 9, 1980, granted certiorari on certain questions concerning the meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, as amended, 42 U.S.C. §6010, and of the Pennsylvania Mental Health/Mental Retardation Act of 1966, 50 Purd. Stat. §4101, whether a private right of action arises under the former statute and the structure of remedy, and specified one additional question. ** The Court denied certiorari as to "Questions 3 presented in petitions Nos. 79-1404 and 79-1489." One of those questions concerned the standing and authority of the United States to intervene as a plaintiff below; the second, raised by the Pennhurst Association, concerned the certification below of the plaintiff class.

Nonetheless, in its Stay Application the Pennhurst Association merely references the statutes before the Court (Application, p. 4) and engages on argumentation as to their meaning or enforceability or a proper remedy under them. Instead the Application addresses the likelihood that petitioners' will succeed on the merits solely in terms of the two questions not before the Court, re-arguing at length*** the class question as to which certiorari was denied****
(Application at p. 2, pp. 5-7, pp10-13

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* Suburban County petitioners sought no stay from the courts below and thus unable to move for a stay in this Court, merely support the Pennhurst Association's Application.

This Court, by Mr. Justice Brennan on July 24, 1979, and on October 1, 1979, as a whole, denied without dissent a previous stay application by the City of Philadelphia. 100 S. Ct. 28 (1979).

** Does 42 U.S.C. §1983 provide a private remedy to enforce the Developmentally Disabled Assistance and Bill of Rights Act.

*** As well as with little fidelity to the record below (see No. 3 below) and in fashion contradictory to its previous averments before the lower courts (see No. 3 below).

**** And as to which the Court of Appeals en banc was unanimous with no member dissenting on this question.

and p. 14) and rearguing the participation of the United States as a plaintiff below (Application, pp. 4-5). Far from being "the substantial issues" or "the pivotal question" (Application, p. 5) in this case, these matters are not before the Court at all.

3. The Pennhurst Association seeks in its Stay Application to secure from this Court relief which it failed to secure from the Pennsylvania Legislature and Governor Thornburgh, namely to stop community services for retarded people and thus to alter the status quo.

The Pennhurst Parents-Staff Association, Inc. has been a lead signatory to a state-wide full page ad campaign organized and paid for by the American Federation of State, County and Municipal Employees seeking to override a Governor's veto and enact legislation prohibiting the reduction of any institution's population by 5%, and any institution staff reduction of 5%, without specific legislative approval.* A copy of the bill and the AFSCME ad, in which one of the afliants to the Pennhurst Association's Stay Application is featured as chairperson are attached at Appendix A and B, respectively.** The campaign has failed in the state legislature.

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* Pennsylvania's Secretary of Welfare, a defendant below and petitioner here, said of this campaign in a letter to the State Senator Dwyer:

> "The newspaper ads to which you refer in your letter are but one ingredient in a well-financed and self-serving campaign to protect some jobs, but at dire risk to the health of patients and significant expenses to the taxpayer. This is an unprecedented use of money, intimidation, and pressure politics to combat the Departments' responsible planning...."

Pa. D. P. W. Release No. 64 (May 20, 1980).

** It is of record in this case that AFSCME, District Council 88 has been paying the attorneys fees of the Pennhurst Association in this case. Deposition of AFSCME District Council Director (July 26, 1979), attached as Appendix 3. Substantial numbers of the members of the Pennhurst Parents-Staff Association are not parents but Pennhurst staff employees, members also of AFSCME. See Ashwander v. TVA, 297 U.S. 288 (1936)(Mr. Justice Brandeis, concurring).

The injury which Applicant seeks to avoid by a Stay is attributed by Applicant to the transfer of Pennhurst residents to community facilities. But such injury would arise in any event because such transfers will occur in any event, whether or not a Stay is granted. The Commonwealth has announced its intention to reduce the number of people at Pennhurst by 300 by transferring them to community facilities during fiscal years 1980-1982. Com. D.P.W., Mental Retardation Facilities: Five Year Plan, Vol. I, Sec. IA, p. 5. (March 1, 1980) (in evidence as Def. Ex. 4, May 27, 1980 proceedings in the District Court and attached hereto as Appendix D). The Commonwealth is going to transfer residents from Pennhurst anyway; that is the status quo. Thus the only difference a Stay would make would be to remove protections for the residents during such transfers, protections which two Courts have found necessary in order to avoid "dumping" retarded people into the community and in order to carry out their statutory rights. *

The Orders now in effect provide for an individual determination before any transfer from Pennhurst** and any determination allowing a transfer to community facilities is reviewable by the district court. Applicant's Appendix

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* These protections include a written Individual Habilitation Plan formulated with the participation of the retarded person and his family as well as relevant professionals, assurance that needed services are in fact in place in accordance with the IHP before a person is transferred, and an opportunity to contest a proposed transfer on these grounds before it occurs. These and other protections are set forth in the Orders attached in Applicant's Appendix at pp. A2, A31, A32, A58-A62, A63-A73. All of these protections would be voided by a Stay, and all of them were constructed because a trial record showed these protections were consistently absent throughout ten years despite state and federal statutory requirements and averments by defendants that they would be provided.

Applicant's assertion that they are "being railroaded" (Application, p. 1) is a brutal and entirely incorrect characterization of the district court's Orders, as any reading of Judge Broderick's Orders will immediately show.

** The Hearing Master appointed to conduct individual determinations was for two years executive director of the American Bar Association's Commission on Mental Disability and for five years has been a member of the Willowbrook Review Panel, the court-appointed monitoring instrument in New York State Association for Retarded Children v. Carey.

p. A66. Since the district court's original orders in this case on March 17, 1978, no person has been transferred from Pennhurst to community living arrangements over the objection of his parents. In the unlikely event that the fears expressed by Applicant--all anticipatory, none realized--should materialize and someone is approved for transfer to unsuitable community facilities, the recourse for the person, a parent or any of the other several parties to the hearing is to the district court and failing there, to appeal. In the event Applicant hypothesizes, the remedy is with the district court, not in a Stay. Indeed, the granting of a Stay would leave retarded persons and their parents without this recourse and with no relief at all from the very event they say they fear.*

Applicants purport to seek to stay only those parts of the Orders which go to transfers to community facilities and those parts which require monitoring and oversight by a Special Master, purporting to leave in place those Orders which go to conditions within the institution. Such a partial Stay, however, would disrupt and dismantle a tested and refined remedial process, constructed by the Courts below with the participation of all parties, to monitor and protect retarded persons in the institution as well as those presently in community facilities. As the Stay Applicant itself said to the Courts below, although it eschews saying so to this Court,** and as the trial record of the institution over ten years shows, protections against abuse, violence and regression in the institution cannot be secured without the monitoring and the structuring provided for in the remainder of the Orders.

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* The overbearing behavior of county case managers or certified advocates of which Applicant complains (Affidavits of Schlosser. Appl. App. p. B.11-B.13, of Caselina, Appl. App. p. B. 3) is, if true, ground for contempt of the district court orders. That is Applicant's remedy, not a Stay. Yet despite recurrent complaints of Applicant here and in its Affidavits for Stay before the Court of Appeals, Applicant has not moved for contempt or for any other sanction to end such asserted behavior.

** Applicant says very different, indeed contradictory, things to this Court from those said to the Court of Appeals when seeking a stay. To the Court of Appeals on April 29, 1980, Applicant said:

"There is no doubt that conditions at Pennhurst have been

(footnote continued)

Absent the protections of the Orders here retarded people will suffer grievous harm as the record shows and as the district court and the Court of Appeals have previously held in denying Stays heretofore. A stay at this point, when for the first time residents of Pennhurst have the benefit of mechanisms to protect their safety, health and life at Pennhurst and when a significant number of residents are about to go out from Pennhurst to community facilities either in the presence of the safeguards provided by the court's Orders or without them at demonstrated risk of injury, would irreparably harm plaintiffs.

The remedies ordered below track exactly, line by line, the Bill of Rights provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. §6010, and the Pennsylvania statute and its regulations. These

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(footnote continued)

> markedly improved as a result of the District Court's Orders, the monitoring by the [Special Master] and the resulting increased scrutiny generally. These portions of the Court's Orders must remain in effect for an unknown period of time, as the montly reports of the [Special Master] indicate that ... Pennhurst remains deficient." (Emphasis supplied)

Applicant's Stay Motion and Memorandum to the Court of Appeals filed April 29, 1980, and denied by the Court of Appeals en banc May 12, 1980 were not supplied their appendicies. They are attached hereto as Appendix E.

Indeed in the proceedings before the District Court before the issuance of the April 24, 1980 Order, Applicant affirmatively commended to the District Court the necessity of a Master's oversight, there recommending exactly the "detailed monitoring and scrutiny" they decry in this Court (Application p. 9). For example, to the District Court, Applicant recommended:

> "The Special Master's Office shall review the finished Plan to ensure that the IHP Guidelines have been followed. [If they have not been] the Special Master shall return the Plan to the Planning Team for further planning in compliance with the Guidelines. Upon completion of the Plan, the Special Master shall direct and monitor defendants in the provision of facilities and services in accordance with the Plan."

Pennhurst Parents-Staff Association Proposed Order, page 4 (filed March 6, 1980).

remedies and appointment of the Special Master, which nearly every lower court finding violations in retardation institutions has found necessary to relief, should not be dispensed with prior to this Court's plenary consideration of this case and the statutes which govern it.

4. The Response of Suburban County petitioners filed Monday, June 23, 1980,* supporting Pennhurst Association's Stay Application also misstates the content and purport of the Orders it would stay.

First, Suburban Counties represent to the Court that "Suburban County Petitioners are the subject of an unqualified Order to provide CLA's and services without any provision for the resources to do so." Sub. Co. Response, p. 2. In fact, the District Court in its Opinion of May 8, 1979, entered after evidentiary hearing of Suburban Counties' motion asking the Court to revise Pennsylvania's retardation funding formulae and rejecting Suburban Counties' motion,** wrote:

> "[T]hree county defendants have requested this Court to order the Commonwealth to provide 100% of the money for the salaries of the case managers and case management supervisors, rather than the 90% which the Commonwealth presently agrees to provide. The Court finds that, at this time, resolution of this issue is not essential to the implementation of the Court's Order. The Commonwealth and county governments have the means to determine, within their respective authorities, the amounts which should be provided for this essential service to the retarded. The Court intends, however, to make certain that both the Commonwealth and county governments take all necessary steps to plan the future funding of case managers and case management supervisors, and the March 5 Order will be amended accordingly."

The district court did order on May 8, 1979, as to case managers, on June 8, 1979, as to CLA's, and on April 24, 1980, as to all expenses within the statutory formulae, that the funds provided the counties under Pennsylvania's statutory formulae must be provided in advance of any quarter, must reflect actual costs as Pennsylvania statute provides, and must be reviewed and adjusted quarterly. The

---

* The Stay Application was filed in the Court Friday, June 20, 1980. It was not served upon Respondents until late in the afternoon of Monday, June 23, 1980.

** Suburban Counties filed no appeal from the May 8, 1979 Order.

County Retardation Administrator for Montgomery County testified in hearings before the district court on June 4, 1979, as to the allocation provisions then embodied in the proposed June 8, 1979 Order:

> "This is the funding procedure which is really essential in the court order and I think it is a good setup, especially the quarterly review provision, which in effect would mandate us and the counties, as well as the Commonwealth, to make quarterly decisions on allocations as programs get fully implemented." Tr. pp. 231-32. *

Second, Suburban Counties represent (Sub. Co. Response, p. 3) that "there is no provision allowing county personnel, such as the County Administrator or the Case Manager having responsibility for the resident ... to contest the move or request a hearing." The district court's Order of April 24, 1980, establishing the individual determinations required by the Court of Appeals is directly and explicitly to the contrary. At paragraph 5, that Order provides:

> "The Pennhurst resident, parent/guardian, certified advocate, the Special Master, The County and The Commonwealth shall have the opportunity to present such evidence as the Hearing Master may find relevant to the issue of the resident's habilitation....
>
> "In the event the resident, parent/guardian, certified advocate, Special Master, County or Commonwealth takes exception to the Hearing Master's findings, said exception shall be filed with the Court within ten (10) days of the date the Hearing Master's report is filed with the Court." (Emphasis supplied)

Third, Suburban Counties assert (Sub. Co. Response, p. 4) that "sweeping language [of the Court's Orders] effectively transfers to the Special Master the direction and control of the mental retardation services delivery system of

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* Suburban Counties, for no apparent reason, raise to this Court in their argument about funding, a pending contempt petition against one County Administrator. This petition has not yet been heard, let alone contempt found, and of course no appeal therefrom is pending, let alone before this Court.

Southeastern Pennsylvania." To the contrary, Judge Broderick's Orders do not remove or transfer any responsibility of any county or of the state but rather, at each point, the Orders sharpen and focus the county and state responsibilities and make clear they are theirs, responsibilities long since assigned by state and federal statute but as the trial record showed, responsibilities ignored, blunted, blurred and confused by county and state conduct over ten years. The Special Master's task is to monitor the performance of those responsibilities by county and state defendants (and of course that requires "every co-operation" of the counties, as the court ordered), a task the Court of Appeals upon plenary consideration of this case and review of the trial record upheld as proper and necessary, particularly since "after the decision on liability was announced, the appellants were afforded an opportunity to devise and present their own remedies for conditions at Pennhurst [and] they failed to do so." Slip Opinion, p. 57.

At this stage in this case, respondents PARC et al., submit, the Stay Application should be denied. The Court of Appeals en banc unanimously found "the conditions to which Pennhurst residents have been subjected" to be "abominable". Slip Op., p. 16. The three judges in dissent themselves found:

> "[T]he conditions at Pennhurst revealed in this record fall below a[ny] statutory or constitutional threshhold of decency so as to merit judicial intervention. The district court adequately documented the conditions at Pennhurst .... Understaffing, filth, violence, enforced inactivity and other horrors make Pennhurst, in the opinion of one well-traveled expert one of the worst institutions of its kind in the world. Under these circumstances the federal courts have a duty to intervene and to secure for Pennhurst's residents, at the very least, adequate living conditions.... I thus have no hesitation in agreeing that the federal judiciary should take the necessary steps to

eliminate those conditions." Slip Op., pp. 67-68 (citations only omitted).

Every judge of the Court of Appeals en banc, those in the dissent and those in the majority, joined in denying this Stay Application when it was presented to them. Until and unless this Court upon plenary consideration of this case finds it necessary and proper to modify, alter or vacate the remedial Orders entered below--if indeed it does not find the Orders and the remedy they embody required by federal and state statute--then, PARC et al., respectfully submit, these remedial Orders should not be dismantled piecemeal. Whatever open questions are before this Court, the remedial Orders below should not be dismantled until they have received the plenary consideration of this Court.

Respectfully submitted,

Thomas K. Gilhool, Esq.
Frank J. Laski, Esq.
Michael Churchill

16th Floor
1315 Walnut Street
Philadelphia, Pennsylvania 19107
(215) 735-7200

Counsel for Respondents
PARC et al.

June 24, 1980

Exhibit "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN, et al.,	:	
	:	
Plaintiffs	:	
	:	CIVIL ACTION NO. 74-1345
v.	:	
	:	
PENNHURST STATE SCHOOL AND HOSPITAL, et al.,	:	
	:	
Defendants	:	

FILED
JUL 24 1980

COMMONWEALTH DEFENDANTS' BRIEF
REGARDING IMPLEMENTATION
OF STAY

This Court's Order of March 17, 1978, as modified by the judgment of the Court of Appeals on December 13, 1979, is the only order before the Supreme Court, both in the certiorari and stay proceedings. In staying that judgment "to the extent that the judgment mandates the movement of residents. . .to 'appropriate community living arrangements'", the Supreme Court acted broadly to enjoin the Court's control and supervision, pending final disposition, over the process of deinstitutionalization.

The March 17 Order has two distinct portions and purposes. First, ¶¶ 1-8 (including ¶¶ 5-8 regarding the Master) relate to and prescribe the process of deinstitutionalization. Although no specific paragraph requires the movement of any specific resident, the mandate of community placement is clearly established, subject only to further implementation orders. Second, ¶¶ 12-19 relate to the upgrading at Pennhurst. The

March 17 order serves as the basis for all subsequent implementation orders--Interim Operation of Pennhurst relating to the second portion of the order, all remaining orders relating to the deinstitutionalization.

The Supreme Court, in granting the stay, no doubt recognized the bifurcated nature of the order under review and acted appropriately. Indeed, stay was not even sought of portions of the March 17 order relating to Pennhurst, except insofar as they implicated the Master.[1] Rather, the focus was judicially mandated and controlled deinstitutionalization. The authority of the court to mandate that process is, of course, the crux of the certiorari petition, as the Court no doubt knew.

The Supreme Court could not address orders not before it.[2] Nor did it attempt to parse the judgment before it paragraph by paragraph. It stayed instead the process of deinstitutionalization, while permitting improvements at Pennhurst to go forward.

Finally, the Supreme Court did not, as the Court of Appeals had previously ordered, limit the stay to instances of involuntary movement. The order's express reference to "appropriate CLAs belies any such possibility.

1/ PARC's summary of the stay motion misstates this aspect of the relief sought. PARC memo at 4, ¶2. Likewise, PARC's "synopsis" of aspects of the motion "granted" and "denied" is not the factual recitation it purports to be, but argument, pure and simple.

2/ Ironically, the only provision PARC deemed stayed - Section 5, ¶ 4-5 of the April 24 order--were not before the Court. Memo at 2. Thus, PARC would interpret the stay as meaningless.

In s. rt, the stay is directly, squarely and broadly aimed at this Court's authority to mandate and control the process of community placement. The Court may neither direct placement nor control its form and process. The only portions of the April 24, 1980 order surviving the stay are:

a. Part I, ¶¶ 11-19 regarding Pennhurst, ¶¶ 5, 7-8 regarding the master insofar as related to Pennhurst activities and ¶ 20; and

b. Part II, ¶¶ 1.0-6.0.

2. This does not mean the placement process will grind to a halt, the spectre raised by some plaintiffs at hearing. Rather, it will move ahead under the jurisdiction of Commonwealth and county officials.

As PARC Exhibit 2 recounts, Commonwealth officials sought promptly after issuance of the stay to insure that placement efforts continued. Acting prior to this Court's July 14 order, the Commonwealth directed the counties to proceed with planning for movement of the school-age children; announced future placement planning; and established a procedure for finalization of the IHP guidelines. A meeting with county officials to formalize these announcements was scheduled for July 17, only to be cancelled in the wake of this Court's order and hearing. That process will continue through-

out the period pending final Supreme Court review.[3]

ROBERT B. HOFFMAN
Deputy Attorney General

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation

HARVEY BARTLE, III
Acting Attorney General

Pa. Dept. of Justice
16th Fl., Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

3/ The trial testimony did not establish that habilitation in Pennsylvania's CLAs was lacking in any respect. The evidence consistent with plaintiffs' trial strategy was quite the contrary. The outstanding credentials of Dr. Howse and her staff is of record.

Exhibit "E"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF MENTAL RETARDATION
JENNIFER L. HOWSE, Ph.D.
DEPUTY SECRETARY

TELEPHONE
AREA CODE 717 787-3700

August 19, 1980

Patricia C. Sweigert, Administrator
BUCKS COUNTY DEPT. OF MH/MR
Neshaminy Manor Center
Doylestown, PA 18901

Dear Ms. Sweigert:

As you are aware, I elected to cancel our meeting originally scheduled for July 17, 1980 in light of the issuance of new court orders on July 14, 1980. I would like to reschedule that meeting on Thursday, August 28, 1980 at 10:00 A.M. at the Philadelphia County MH/MR Office.

At that time, I will outline my recommended direction regarding placement of plaintiff class members. Additionally, I will ask for agreement between the Commonwealth and the counties as to how to proceed with the placement of the school-age children. Further, the Commonwealth, as a second priority, is committed to the placement of an additional 65 clients from Pennhurst in order to bring the staffing ratios at Pennhurst into compliance with the staffing study submitted to the Court in July, 1980. Finally, I would like to suggest for your comment, proposed steps for future planning and development of community living arrangements for other plaintiff class members still at Pennhurst, Embreeville, Woodhaven and within the community.

I hope this meeting will help to accomplish a unified strategy and identification of priorities for meeting the needs of plaintiff class members. Your continued support and effort to meet our mutual goals is critical. I am looking forward to our meeting.

Sincerely,

Jennifer L. Howse, Ph.D.

cc: Helen B. O'Bannon
Russell G. Rice, Jr., Ed.D.
George A. Kopchick, Jr.

Exhibit "F"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF MENTAL RETARDATION
JENNIFER L. HOWSE, PH.D.
DEPUTY SECRETARY

TELEPHONE
AREA CODE 717. 787-3700

October 8, 1980

RECEIVED
OCT 10 1980
MH/MR

William A. McKendry, Administrator
CHESTER COUNTY MH/MR PROGRAM
24 South New Street
West Chester, PA 19380

Dear Bill:

I am writing to follow-up on our meeting held on August 21st at which time, we discussed the impact of this year's allocation on the placement projections of sixty-five (65) Pennhurst adults.

As part of our planning effort, I am requesting that you provide the following information: 1) the number of Pennhurst adults your county agrees to place in CLA's by June 30, 1980; 2) the names of the clients if identified; 3) the estimated costs (per diem) for providing CLA's to the above number of clients through June 30, 1980; 4) the anticipated start-up costs for the development of these CLA's; and 5) timeframes anticipated for implementing these programs. Additionally, please provide similar information for the County's projections on placement of identified community clients in need of CLA placements. Please submit the above information to my office and the Regional Office no later than October 31, 1980.

The Office of Mental Retardation is anxious to provide assistance to the counties to facilitate the placement of Pennhurst clients. The information requested above, upon review, may impact upon the current year's allocation, in that additional resources may be identified, if appropriate.

I am hopeful that the Office of Mental Retardation and the counties can establish a joint strategy for the continued placement of Pennhurst residents to achieve our mutual goal of deinstitutionalization. Your continued support and effort is appreciated.

Sincerely,

Jennifer L. Howse, Ph.D.

cc: George A. Kopchick, Jr.
Dorothy J. Rowe
Russell G. Rice, Jr., Ed.D.
Karen F. Snider

Exhibit "G"

STATE CENTERS

COST COMPARISONS

(Annual Costs in Thousands)

	ACTUAL COSTS				PROJECTED COSTS AT CURRENT RESIDENT LEVELS											
	1974-1975		1978-1979		1979-1980		1980-1981		1981-1982		1982-1983		1983-1984		1984-1985	
Facility	Annual	Per Diem	Annual	Per Diem	Annual	Per Diem	Annual	Per Diem	Annual	Per Diem	Annual	Per Diem	Annual	Per Diem	Annual	Per Diem
Cresson	8,572	54.55	10,141	92.45	11,412	113.70	11,973	119.29	12,967	129.19	14,046	139.94	15,214	151.58	16,480	164.19
Ebensburg	13,837	41.93	18,021	63.48	20,199	74.79	22,234	87.65	24,072	117.77	26,061	129.35	28,216	139.67	30,552	151.64
Hamburg	9,950	35.39	14,019	59.60	16,783	79.28	17,408	84.57	18,851	109.42	20,414	146.03	22,108	157.72	23,944	171.28
Laurelton	7,386	46.43	9,590	90.76	11,216	113.81	11,701	94.29	12,676	98.11	13,733	106.29	14,877	114.83	16,120	124.76
Marcy	1,873	74.98	5,481	90.58	6,139	80.10	6,416	73.86	6,956	67.35	7,541	73.01	8,175	78.93	8,865	85.83
Pennhurst	28,046	40.21	40,288	70.13	52,213	135.08	38,345*	134.00	41,556	226.80	45,038	489.65	48,815	530.72	52,911	575.25
Polk	28,530	33.71	47,239	76.10	52,418	89.09	47,292*	107.98	51,208	144.34	55,451	173.63	60,049	202.56	65,030	237.56
Selinsgrove	18,319	34.91	26,184	62.26	29,381	73.18	32,535	95.13	35,225	115.72	38,138	139.14	41,294	164.71	44,712	200.82
Woodhaven	5,979	141.98	13,030	144.31	15,826	160.59	16,470	165.90	18,085	182.17	19,859	200.03	21,807	219.06	23,947	241.21
Western	11,053	49.20	14,597	86.54	16,340	99.49	16,857	120.90	18,263	135.24	19,786	142.66	21,439	154.15	23,231	167.49
White Haven	12,948	41.91	17,214	66.15	19,733	78.36	21,055	94.72	22,791	132.01	24,672	146.95	26,708	158.64	28,914	188.61
Embreeville HR					7,994	73.01	13,598	124.19	14,724	115.26	15,942	121.33	17,264	117.93	18,694	129.05
TOTAL	146,493		215,804		259,654		255,884		277,374		300,681		325,966		353,400	

* No contracts.

Exhibit "H"

MR ATTACHMENT I

COUNTY: BUCKS

PRIMARY MENTAL RETARDATION
COMMUNITY SERVICES ALLOCATION FOR THE 1980-81 FY

The below-listed General (Non-Categorical) MR amount includes sufficient monies $166,452 to enable the County (or County Joinder) to continue full operation (i.e. without service reduction) of existing Early Intervention programs. In addition, the General MR amount must be used to fund continuation of Child Day Care Services formerly funded during the 1978-79 fiscal year with the Title XX monies (as outlined in County MH/MR Memorandum #55).

General (Non-Categorical) MR	$ 858,822	Non-categorical	(90%)
Family Resource Services	$ 216,709	Categorical	(90%)
Case Management/CLA and/or Pennhurst	$ 130,659	Categorical	(90%)
Special Vocational Services (CLA and/or Pennhurst)	$ 946,500	* Categorical	(100%)
Community Living Arrangements			
(A) for 102 operational CLA slots	$ 1,790,481	Categorical	(100%)
with 0 of these slots reserved for Pennhurst children.	$ -0-	Categorical	(100%)
(B) for 15 new CLA slots **	$ 217,400	Categorical	(100%)
GRAND TOTAL	$ 4,160,571		

*The only exception to the 100% categorical for Special Vocational Services is $495,000 in 4th+ years funding which is 90% categorical. Funding amounts for the other three years are as follows: 1stYr. $1,500; 2ndYr. -0-; 3rdYr. $450,000.

**Number of persons transferring into new CLA slots from the following institutions:

9 Pennhurst	1 Hamburg	1 Ebensburg
White Haven	Western	Selinsgrove

County-Specific Comments:

(1) As stated in the main body of this Primary Allocation letter, interim care amounts will be announced by the end of August 1980.

MR ATTACHMENT I

COUNTY: CHESTER

PRIMARY MENTAL RETARDATION
COMMUNITY SERVICES ALLOCATION FOR THE 1980-81 FY

The below-listed General (Non-Categorical) MR amount includes sufficient monies $455,097 to enable the County (or County Joinder) to continue full operation (i.e. without service reduction) of existing Early Intervention programs. In addition, the General MR amount must be used to fund continuation of Child Day Care Services formerly funded during the 1978-79 fiscal year with the Title XX monies (as outlined in County MH/MR Memorandum #55).

General (Non-Categorical) MR	$ 911,321	Non-categorical	(90%)
Family Resource Services	$ 145,179	Categorical	(90%)
Case Management/CLA and/or Pennhurst	$ 93,177	Categorical	(90%)
Special Vocational Services (CLA and/or Pennhurst)	$ 453,000 *	Categorical	(100%)
Community Living Arrangements			
(A) for 107 operational CLA slots	$ 1,643,158	Categorical	(100%)
with 9 of these slots reserved for Pennhurst children.	($ 357,824)	Categorical	(100%)
(B) for 21 new CLA slots **	$ 305,210	Categorical	(100%)
GRAND TOTAL	$ 3,551,045		

*The only exception to the 100% categorical for Special Vocational Services is $ 450,000 in 4th+ years funding which is 90% categorical. Funding amounts for the other three years are as follows: 1stYr. $3,000; 2ndYr. -0-; 3rdYr. -0-.

**Number of persons transferring into new CLA slots from the following institutions:

12 Pennhurst	4 Hamburg	1 Ebensburg
White Haven	Western	Selinsgrove

County-Specific Comments:

(1) As stated in the main body of this Primary Allocation letter, interim care amounts will be announced by the end of August 1980.

MR ATTACHMENT I

COUNTY: DELAWARE

PRIMARY MENTAL RETARDATION
COMMUNITY SERVICES ALLOCATION FOR THE 1980-81 FY

The below-listed General (Non-Categorical) MR amount includes sufficient monies $114,314 to enable the County (or County Joinder) to continue full operation (i.e. without service reduction) of existing Early Intervention programs. In addition, the General MR amount must be used to fund continuation of Child Day Care Services formerly funded during the 1978-79 fiscal year with the Title XX monies (as outlined in County MH/MR Memorandum #55).

General (Non-Categorical) MR	$ 869,801	Non-categorical	(90%)
Family Resource Services	$ 191,011	Categorical	(90%)
Case Management/CLA and/or Pennhurst	$ 105,332	Categorical	(90%)
Special Vocational Services (CLA and/or Pennhurst)	$ 79,056	* Categorical	(100%)
Community Living Arrangements			
(A) for 113 operational CLA slots	$ 2,251,551	Categorical	(100%)
with 18 of these slots reserved for Pennhurst children.	($ 735,469)	Categorical	(100%)
(B) for 15 new CLA slots **	$ 217,400	Categorical	(100%)
GRAND TOTAL	$ 3,714,151		

*The only exception to the 100% categorical for Special Vocational Services is $ -0- in 4th+ years funding which is 90% categorical. Funding amounts for the other three years are as follows: 1stYr. -0-; 2ndYr. $79,056; 3rdYr. -0-.

**Number of persons transferring into new CLA slots from the following institutions:

9 Pennhurst	1 Hamburg	1 Ebensburg
White Haven	Western	Selinsgrove

County-Specific Comments:

(1) As stated in the main body of this Primary Allocation letter, interim care amounts will be announced by the end of August 1980.

MR ATTACHMENT I

COUNTY: MONTGOMERY

PRIMARY MENTAL RETARDATION
COMMUNITY SERVICES ALLOCATION FOR THE 1980-81 FY

The below-listed General (Non-Categorical) MR amount includes sufficient monies $283,645 to enable the County (or County Joinder) to continue full operation (i.e. without service reduction) of existing Early Intervention programs. In addition, the General MR amount must be used to fund continuation of Child Day Care Services formerly funded during the 1978-79 fiscal year with the Title XX monies (as outlined in County MH/MR Memorandum #55).

General (Non-Categorical) MR	$ 738,819	Non-categorical	(90%)
Family Resource Services	$ 239,227	Categorical	(90%)
Case Management/CLA and/or Pennhurst	$ 132,889	Categorical	(90%)
Special Vocational Services (CLA and/or Pennhurst)	$ 1,981,020	* Categorical	(100%)
Community Living Arrangements			
(A) for 261 operational CLA slots	$ 4,377,321	Categorical	(100%)
with 21 of these slots reserved for Pennhurst children.	($ 617,155)	Categorical	(100%)
(B) for 27 new CLA slots **	$ 387,179	Categorical	(100%)
GRAND TOTAL	$ 7,856,955		

*The only exception to the 100% categorical for Special Vocational Services is $ 1,125,020 in 4th+ years funding which is 90% categorical. Funding amounts for the other three years are as follows: 1stYr. $6,000; 2ndYr. $275,000; 3rdYr. 575,000.

**Number of persons transferring into new CLA slots from the following institutions:

16 Pennhurst	3 Hamburg	3 Ebensburg
White Haven	Western	Selinsgrove

County-Specific Comments:

(1) As stated in the main body of this Primary Allocation letter, interim care amounts will be announced by the end of August 1980.

Received 9:05 8-21-80
via Telecopier

ATTACHMENT 1

CITY: Philadelphia

PRIMARY MENTAL RETARDATION
COMMUNITY SERVICES ALLOCATION FOR THE 1980-81 FY

The below-listed General (Non-Categorical) MR amount includes sufficient
tax $239,269 to enable the County (or County delegate) to continue full
ration (i.e. without service reduction) of existing Early Intervention programs.
addition, based on 10% of the 1966 Mental Health/Mental Retardation Act, $3,957,600
Categorical Special Needs/Early Intervention monies has been allocated to Philadelphia
nty for the 1980-81 fiscal year. This will include 100% funding for children enrolled
or to 7/1/80 and 90% funding for children enrolled afterwards.

eral (Non-Categorical) MR	$ 3,973,117	Non-categorical	(90%)
mily Resource Services	$ 440,316	Categorical	(90%)
se Management/CLA and/or Pennhurst	$ 396,419	Categorical	(90%)
ecial Vocational Services (CLA and/or Pennhurst)	$ 2,400,464 *	Categorical	(100%)
mmunity Living Arrangements			
(A) for 302 operational CLA slots with 25 of those slots reserved for Pennhurst children.	$5,825,349 ($ 800,685)	Categorical Categorical	(100%) (100%)
(B) for 33 new CLA slots **	$ 473,219	Categorical	(100%)
GRAND TOTAL	$13,308,884		
	+ 3,957,660		
	17,266,484		

*The only exception to the 100% categorical for Special Vocational Services is $1,114,260 in 4th+ years funding which is 90% categorical. Funding amounts for the other three years are as follows: 1st Yr. $888,260; 2nd Yr. 0; 3rd Yr. $979,951.

These figures revised

**Number of persons transferring into new CLA slots from the following institutions:

19 Pennhurst	4 Harburg	2 Ebensburg
White Haven	Western	Selinsgrove

County-Specific Comments:

(1) As stated in the main body of this Primary Allocation letter, interim care amounts will be announced by the end of August 1980.

(2) The General (non-categorical) MR amount reflects a $200,000 reduction from the tentatively allocated funding level. The Department has taken this step because the $200,000 in question was legislatively appropriated to Philadelphia ARC to provide MR services to residents of Philadelphia County.

Exhibit "I"

PENNHURST STUDY
BRIEF REPORT #1

DEVELOPMENT OF SEVENTEEN FORMER PENNHURST RESIDENTS WHO ARE NOW IN COMMUNITY LIVING ARRANGEMENTS IN MONTGOMERY COUNTY

BY:

JAMES W. CONROY
JAMES A. LEMANOWICZ
LESLIE SOKOL
MATTHEW POLLACK

Evaluation & Research Group
Temple University Developmental Disabilities Center
9th Floor Ritter Annex
Philadelphia, PA 19122
(215-787-1356)

DATE: October 16, 1980

INTRODUCTION

The Evaluation & Research Group collected a Behavior Development Survey (BDS) for every resident of Pennhurst Center in September, 1978. Since that date, 17 clients have been relocated to small community settings in Montgomery County. In October, 1980, the Evaluation & Research Group collected a second Behavior Development Survey (BDS) at the community residences of each of the 17 clients.

This Brief Report describes the current adaptive functioning status of the 17 clients as compared to their status while at Pennhurst. We do not generalize findings from these 17 people to any other people, nor do we know the "causes" of the changes in adaptive functioning.

FINDINGS 1: GROWTH

The BDS is usually analyzed in terms of three adaptive skill areas. Personal Self-Sufficiency is the sum of scores on 10 items (e.g., body balance, self-care at toilet, use of table utensils); Community Self-Sufficiency is made up of 14 items (e.g., food preparation, complex instruction, money handling, room cleaning); Personal-Social Responsibility has 7 items (e.g., care of clothing, interaction with others, initiative).

In the table below, we present the range of each subscale, the mean score of the 17 clients when they were at Pennhurst, and their mean score now, two years later, in community settings.

SKILL AREA	RANGE	MEAN SCORE AT PENNHURST	MEAN SCORE IN COMMUNITY	CHANGE
Personal Self-Sufficiency	0-47	32.2	38.0	+5.8
Community Self-Sufficiency	0-51	13.4	19.2	+5.8
Personal-Social Responsibility	0-26	10.6	15.2	+4.6
Total BDS	0-124	56.2	72.4	+16.2

Although each of these changes is statistically significant beyond the .01 level, such significance are meaningless because we do not intend to generalize to, or make inferences about, other clients. We must focus on practical significance here. In this case, a gain of 16 total points is obviously large for a scale with only 124 points.

In fact, 16 of the 17 clients have gained in adaptive skills, as displayed below:

1	client	lost	6	BDS	points
2	clients	gained	6	BDS	points
1	"	"	7	"	"
3	"	"	10	"	"
1	"	"	15	"	"
3	"	"	18	"	"
1	"	"	19	"	"
1	"	"	20	"	"
1	"	"	21	"	"
1	"	"	26	"	"
1	"	"	33	"	"
1	"	"	45	"	"

FINDINGS 2: CLIENTS

These 17 clients were not mildly retarded. In fact, one was "moderately" retarded, 10 severe, and 6 profound. Three had some difficulty with vision, one had a mild hearing problem, three were non-ambulatory and two more had difficulty walking.

They had been at Pennhurst an average of 22.1 years (minimum three, maximum 47) at the time of their release; they are now 36.9 years old on the average (minimum 15, maximum 63). They have been in the community a median of 12 months (minimum five, maximum 29 months), meaning that half have been out longer, and half shorter, than 12 months.

FINDINGS 3: CORRELATES OF GROWTH

Is level of retardation related to growth among these 17 people? The

one moderately retarded client gained 28 BDS points, the 10 severely retarded clients gained an average of 14.2 points, and the 6 profoundly retarded clients gained an average of 18.0 points. There is no clear pattern.

Is the length of time in residence at Pennhurst related to growth when placed in the community? Clients who had been at Pennhurst one to nine years, and there were six of them, gained 21.7 points. The five clients who had been at Pennhurst 10 to 29 years gained 10.0, and the six who had been at Pennhurst over 30 years gained 16.0 points. Apparently, there is some slight tendency (among these clients - please do not generalize) for those who had been at Pennhurst for a short or for a very long time to gain more.

Is age related to growth? A similar pattern appeared:

Age 1-21	N=4	Average gain = 25.5
Age 22-39	N=6	Average gain = 7.5
Age 40 plus	N=7	Average gain = 18.4

The youngest and the oldest benefited most.

Supreme Court, U.S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-738

IN RE: PENNHURST PARENTS-STAFF ASSOCIATION

ON APPLICATION FOR A WRIT OF MANDAMUS

MEMORANDUM OF THE UNITED STATES IN OPPOSITION

Petitioner asks this Court for an extraordinary writ of mandamus, contending that the district court has misinterpreted this Court's partial stay issued on June 30, 1980. Alternatively, it seeks a modification of that order. Petitioner has failed to show a sufficient basis for either request.

1. Petitioner sought, pending final disposition of petitions Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489,[1/] a stay from this Court of aspects of the district court orders pertaining to movement of Pennhurst residents to community placements in accordance with the court of appeals judgment requiring determination of individual needs. A stay of the court of appeals judgment was granted "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements'" (Pet. App. A).

The district court accordingly on July 14, 1980 prohibited the transfer of any Pennhurst resident to a community living

1/ Petitioners here are also petitioners in No. 79-1489.

arrangement "in accordance with prior court orders unless the Hearing Master has determined that such transfer is voluntary" (Pet. App. A). After conducting a hearing and considering the briefs filed by the parties, the district court concluded on July 29, 1980, that no further modification of its earlier orders was necessary (Pet. App. B). Petitioners did not seek review of either the July 14 or the July 29 order here.[2/]

The Hearing Master accordingly continued to review the individual community placement plans for Pennhurst residents. On October 8, 1980, the Master issued a report concerning the placement of P.T., whose parents objected to the placement proposed for him. The Hearing Examiner concluded that (Pet. App. D(b) 15-16):

> Especially since P.T. is an adult and since his parents are not his legal guardians, I do not believe that the objections of his parents * * * must be treated as conclusive [on the issue of voluntariness]. * * * Nonetheless, I do not believe it would be proper for me to disregard entirely the objections of P.T.'s parents * * *. After extensive research and consideration the Hearing Examiner has determined that what he must do in this case is to make a substituted judgment as to what P.T. would choose if he were competent to do so * * *.

Applying this standard, and emphasizing the failure of the County and the Commonwealth to respond adequately to the parents' concerns for P.T.'s safety in the proposed community living arrangement (Pet. App. D(b) 19-22), the Hearing Examiner concluded that the

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2/ The Commonwealth defendants, petitioners in No. 79-1404, appealed to the court of appeals, but moved that briefing be postponed in light of this petition.

proposed transfer was not voluntary, ordered that the arrangements for the transfer be terminated, and directed the County to work with P.T.'s parents "to resolve their concerns about the proposed placement" (id. at 23).

On October 15, 1980, the Hearing Examiner, applying the same test of voluntariness (Pet. App. D(a) 11-16), determined that G.W.'s proposed placement was voluntary, because his parents' objections to community placement were based on their concern "that they or their other children might be 'embarrassed' if they encountered G.W. in the community * * *."[3/]

In accordance with established procedures (Pet. App. D(a) 24, D(b)30), exceptions to the Hearing Master's reports were filed with the district court (Pet. App. C3). Hearing on those exceptions have been scheduled for November 19-21, 1980. See letter of November 12, 1980 from Judge Broderick to Michael Rodak.

2. The petition should be denied because the district court has faithfully complied with this Court's partial stay order.[4/] The district court's conclusion that this Court's order bars only involuntary transfers out of Pennhurst is supported by the history of the case, the language of the stay order and the background of its issuance.

3/ In this case, too, the Hearing Examiner emphasized that G.W. is also an adult, and his parents are not his legal guardians (Pet. App. D(a) 11).

4/ There is accordingly no need to consider whether review of the district court's order of July 15, 1980, should be accomplished by appeal or through application for issuance of an extraordinary writ. Cf., Baltimore & Ohio Railroad Co. v. United States, 279 U.S. 781, 785 (1929); Vendo Co. v. Lektro-Vend. Corp., 434 U.S. 425 (1978).

On direct appeal, the district court's order requiring the movement of Pennhurst residents to community living arrangements was modified. Instead, the court of appeals required the district court to ascertain the individual needs of Pennhurst residents before ordering them placed in the community. At the time of the stay order the district court had entered an order, pursuant to the court of appeals requirement, establishing a procedure for determining before a Hearing Master whether Pennhurst or a community placement developed by county authorities for a particular retarded person would be more beneficial for that person (Pet. App. B 4).

In seeking to stay the entire process of developing and planning community placements, petitioner asserted that "parent members of the movant Association are being railroaded into placing their children in community facilities that they believe are inadequate to meet the children's needs." (Memorandum in Support (of Motion to Stay Orders of the United States District Court for the Eastern District of Pennsylvania, No. A-1134). Petitioner also sought to preserve the "status quo", but Commonwealth defendants, petitioners in No. 79-1404, did not join in the motion for the stay because they "hoped at that time the bureaucratic structure created by the District Court would promote and not unduly hinder placement efforts" and "feared that a stay might restrain as well [the Common-

wealth's] placement program" (Petitioners Pennhurst State School and Hospital, Memorandum in Support of Petition for Writ of Mandamus and Prohibition, p. 2).

At the July 21, 1980, hearing to ascertain the scope and meaning of the partial stay petitioner, who had sought the stay, argued that it not only removed any compulsion on the Commonwealth and the Counties to move Pennhurst residents to the communities, but prohibited their doing so.[5/] The district court correctly rejected this interpretation; such a broad reading of the stay is not necessary to protect petitioner's concerns that its members' children or wards may be forced into harmful community living arrangments over their objections. Nothing in the stay application suggested that placement in the community of Pennhurst residents who wish such placement would cause irreparable injury to the Commonwealth or the Counties.

It is fundamental that stays by appellate courts of relief ordered by trial courts rest on a demonstration of irreparable injury by the moving party. Although this Court gave no indication of the harm which it sought to prevent by its stay, it was reasonable for the district court to assume

5/ The county officials who had joined the stay motion, and state officials who had not, contended instead that the stay left them with the discretion to place Pennhurst residents in the community as they saw fit, but "removed the authority of [the district court] to exercise any control over such voluntary placements" (Pet. App. B 3). The district court rejected this interpretation on the basis of a comparison of the stay application with this Court's order (Pet. App. B 4).

that the Court meant to give deference to concerns of the moving party - the Parents-Staff Association - concerning possible inappropriate placement of Pennhurst residents. It was equally reasonable to assume that the Court did not mean to prevent state and county officials from developing community alternatives to Pennhurst, where community placement would provide an improved habilitation setting for that individual and would be in accordance with state policy and the wishes of the individual and his guardian. Refusing to allow residents to transfer voluntarily from Pennhurst to more appropriate settings would neither preserve issues for review nor prevent irreparable injury to petitioner; if anything, it would cause irreparable injury to such residents.

The petition for mandamus or prohibition should accordingly be denied.

3. Petitioner alternatively asks this Court to grant the stay which it denied in its June 30, 1980 order -- requiring the dismantling of the district court's procedures for insuring that community placements will be beneficial in fact to the residents of Pennhurst. The Commonwealth joins in this request, not because it opposes movement of Pennhurst residents to other more beneficial habilitation settings, but because it does not wish to pay the expense of judicial oversight of that movement.

Petitioner presents only one new set of facts to this Court --- facts regarding experience under the district court's

order. Petitioner refers to alleged expenses of implementation (Pet. 15) and to seventeen placement hearings, including two in which the parents objected to placement (Pet. App. C).

In one instance the Master overruled the objections and ruled that the proposed transfer of G.W. was voluntary. In the other, the Hearing Examiner concluded that, on the record before him, the placement was not voluntary, and accordingly directed that further efforts to satisfy the parents' objections be undertaken.[6/] The care and deliberate speed reflected in these actions of the Master refute any contention that the district court's order has harmed residents of Pennhurst.

The Commonwealth does not seek to halt community placements. It claims it wants them to continue and asserts it will make them without judicial compulsion. Thus, no infringement of state policies or prerogatives is claimed. No claim is made that any resident has been moved contrary to the judgment of state or county officials or professionals. Instead, the Commonwealth implies that existing judicial oversight of community placements has restrained movement of Pennhurst residents to the community (Pennhurst State School and Hospital Memorandum 2-3).

6/ Petitioner's objections (Pet. 9) to the Hearing Examiner's interpretation of the voluntariness requirement can be presented to the district court in the course of the hearing on the exceptions to the Reports concerning G.W. and P.T. (see supra p. 3). There is no need for this Court to consider those objections on this record.

The position of the Commonwealth on the stay thus parallels its position throughout this case -- Pennhurst residents would benefit by being moved into the community, the Commonwealth intends to proceed with the movement of those residents, but it opposes judicial supervision of that movement. By joining the motion for a stay, the Commonwealth simply seeks to save the costs of the Special Master and the Hearing Master.[7/]

On the other side of the balance, the record showing the effects of confinement of persons to Pennhurst has now been spread before the Court, and discussed in some detail in the briefs. The briefs demonstrate that retention of a person in Pennhurst when a more appropriate community placement, which would enhance the resident's habilitation, is available would harm that person.

Moreover, the detailed reports of the Hearing Master attached to the submission of the Parents-Staff Association

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7/ The Commonwealth state takes the position that the funds spent could be used for providing services in the communities. The Parents-Staff Association argues that the funds could be used to improve Pennhurst. While expense is obviously a type of harm caused to the state by the extant relief, these assertions cannot be weighed in the balance of harms because they are so incomplete. They do not, for example, furnish the cost of maintaining persons in Pennhurst for comparison purposes; nor is there any showing of how the projected costs of the two Masters compare with past costs; nor do the facts presented include any allocation of the costs of the Special Master to her function of supervising the improvements at Pennhurst, a function which the motion does not seek to stay.

amply demonstrate the need for judicial oversight to protect the interests of Pennhurst residents in proper habilitation (Pet. App. D). In the case of P.T., the community placement was not ordered, primarily because county and Commonwealth officials had failed to respond to the legitimate concerns of the parents. The result was that P.T. will have to remain at Pennhurst for an indefinite time. Perhaps the mediation ordered by the Hearing Master will resolve the issue. Without the Hearing Master, however, it is clear that P.T. would either remain in Pennhurst, or be placed in a community living arrangement which lacks features his parents, at least, believe necessary.[8/]

This report, along with the district court's order of July 14, 1980 (Pet. App. B), highlight the importance of the court's participation in the development of procedures to resolve the conflicting interests that inevitably arise in making a determination of the benefits of particular settings for particular Pennhurst residents. Without them, there would be no resolution, and Pennhurst

8/ The G.W. report, on the other hand, shows a case where considerable efforts were made by county authorities to eliminate features of a community placement to which parents objected, but it became clear that all objection could not be eliminated because the objections were based, not upon factors relevant to G.W.'s welfare, but upon the fear that his parents, or siblings, will be embarrassed by G.W.'s being in their community. Should the Commonwealth and counties acquiesce in such objections, G.W. would suffer harm.

residents would inevitably suffer. There is no showing that the Commonwealth has any plans to perform the function now performed by the district court to protect the interests of the Pennhurst residents. On the contrary, the record shows that the Commonwealth has been reluctant to attempt to resolve differences (Pet. App. D(b)21).

It is therefore respectfully submitted that the petition for a writ of mandamus or for an additional stay should be denied.

WADE H. McCREE
Solicitor General

NOVEMBER 1980